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Supreme Court, U.S.
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In the

Supreme Court of the United States

HARRY PTASYNSKI and W.L. GRAY & CO.,

Petitioners,

v.

SHELL WESTERN E&P INC., SHELL OIL COMPANY and MOBIL OIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS IS COMPLICIT IN THE CREATION OF THE GREATEST OIL AND GAS ACCOUNTING SCANDAL TO DATE – THE "NEGATIVE ROYALTY".

II. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO FOLLOW THE CONTROLLING TENTH CIRCUIT AUTHORITY GOVERNING FIDUCIARY DUTY FOR CARBON DIOXIDE UNITS AS DETERMINED IN *ATLANTIC RICHFIELD CO. V. FARM CREDIT BANK OF WICHITA*, 226 F.3d 1138, 1162 and 1163 (10th Cir. 2000).

III. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS VIOLATED PETITIONERS' RIGHTS UNDER THE FIFTH AMENDMENT AND SEVENTH AMENDMENT BY CREATING FACTS IN CONTRADICTION TO THE FACTS FOUND AT TRIAL AND BY HOLDING THAT PETITIONERS COULD NOT RELY UPON SHELL AND MOBIL'S WRITTEN REPRESENTATIONS MADE IN THE COLOR BROCHURE WHICH SOLICITED PETITIONERS' CONSENT TO THE UNIT BECAUSE "EACH HAD OVER FORTY YEARS EXPERIENCE IN THE OIL AND GAS BUSINESS".

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dated February 13, 2002 is set forth in the Appendix, p. 1a. The decision of the United States Court of Appeals for the Fifth Circuit which denied the Petitions for Rehearing and Rehearing En Banc dated May 24, 2002 is set forth in the Appendix, p. 45a. The Final Judgment dated August 13, 1999 of the United States District Court for the Northern District of Texas is set forth in the Appendix, p. 59a. and the Oral Findings of Facts and Conclusions of Law rendered by the Court from the bench on August 9, 1999 are set forth in the Appendix, p. 48a. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas entered June 16, 1999 is set forth in the Appendix, p. 31a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit denied the Petitions for Rehearing on May 24, 2002. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Constitutional Issues

1. **Fifth Amendment of the United States Constitution**

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **Seventh Amendment of the United States Constitution**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statutory Issues

Col. Rev. Stat. Section 34-60-118

(5) No order of the commission providing for unit operations shall become effective unless the plan for unit operations prescribed by the commission has been approved in writing by those persons who, under the commission's order, will be required to pay at least eighty percent of the costs of unit operation, and also by the owners of at least eighty percent of the production or proceeds thereof that will be credited to interests which are free of cost, such as royalties, overriding royalties, and production payments, and the commission has made a finding, either in the order providing for unit operations or in a supplemental order, that the plan for unit operations has been so

approved. If the plan for unit operations has not been so approved at the time the order providing for unit operations is made, the commission shall upon application and notice hold such supplemental hearings as may be required to determine if and when the plan for unit operations has been so approved. If the persons owning the required percentage of interest in unit area do not approve the plan for unit operations within a period of six months from the date on which the order providing for unit operations is made, such order shall be ineffective and shall be revoked by the commission unless for good cause shown the commission extends said time.

Col. Rev. Stat. Section 34-60-118.5 Payment of Proceeds

(2.3) Notwithstanding any other applicable terms or arrangements, every payment of proceeds derived from the sale of oil, gas or associated products shall be accompanied by information that includes, at a minimum:

(a) A name, number, or combination of name and number that identifies the lease, property, unit, or well or wells for which payment is being made;

(b) The month and year during which the sale occurred for which payment is being made;

(c) The total quantity of product sold attributable to such payment, including the units of measurement for the sale of such product;

(d) The price received per unit of measurement, which shall be the price per barrel in the case of oil and the price per thousand cubic feet ("MCF") or per million British thermal units ("MMBTU") in the case of gas;

(e) The total amount of severance taxes and any other production taxes or levies applied to the sale;

(f) The payee's interest in the sale, expressed as a decimal and calculated to at least the sixth decimal place;

(g) The payee's share of the sale before any deductions or adjustments made by the payor or identified with the payment;

(h) The payee's share of the sale after any deductions or adjustments made by the payor or identified with the payment;

(i) An address and telephone number from which additional information may be obtained and questions answered.

V.T.C.A., Natural Resources Code Section 91.501. Information Required

If payment is made to a royalty interest owner from the proceeds derived from the sale of oil or gas production pursuant to a division order, lease, servitude, or other agreement, the person making the payment shall include the information required by Section 91.502 of this code on the check stub or on an attachment to the payment form.

V.T.C.A., Natural Resources Code Section 91.502. Types of Information Provided

Each check stub or attachment to a payment form must include:

(1) the lease, property, or well name or any lease, property, or well identification number used to identify the lease, property, or well;

(2) the month and year during which the sales occurred for which payment is being made;

(3) the total number of barrels of oil or the total amount of gas sold;

(4) the price per barrel or per MCF of oil or gas sold;

(5) the total amount of state severance and other production taxes paid;

(6) the windfall profit tax paid on the owner's interest;

(7) any other deductions or adjustments;

(8) the net value of total sales after deductions;

(9) the owner's interest in sales from the lease, property, or well expressed as a decimal;

(10) the owner's share of the total value of sales before any tax deduction;

(11) the owner's share of the sales value less deductions; and

(12) an address at which additional information may be obtained and questions may be answered.

STATEMENT OF THE CASE

Procedural History

On May 21, 1997, Harry Ptasynski, a citizen of Wyoming, and W.L.Gray & Co., a Colorado partnership composed of Colorado citizens Wilfred Gray and his wife (hereinafter "Petitioners") sued Shell Western E&P Inc. and Shell Oil Company (hereinafter "Shell") and later Mobil Oil Corporation (hereinafter "Mobil") seeking relief for willfully filing fraudulent information returns, fraud, fraudulent concealment, civil conspiracy, negligent misrepresentation, breach of duty of good faith and fair dealing, breach of contract, declaratory judgment and negligence per se in the United States District Court for the Northern District of Texas. On June 16, 1999, the District Court issued a Memorandum Opinion and Order involving summary judgment motions that had been filed. The case was tried on August 2, 3, and 9, 1999. On August 13, 1999 a Final Judgment was entered awarding Petitioners damages from Shell and Mobil for the transportation charges they deducted from Petitioners' overriding royalties from January 1984 through June 1999 plus prejudgment interest. Declaratory judgment relief was entered in Petitioners' favor declaring that Shell and Mobil would not deduct the transportation charges to West Texas from Petitioners' overriding royalties in the future. Shell and Mobil filed appeals and cross appeals were filed by Petitioners on September 23, 1999. The District Court's award of damages and Declaratory Judgment relief to Petitioners was reversed on February 13, 2002 and timely Petitions for Panel Rehearing and Rehearing En Banc were filed on February 26, 2002. The Petitions for Rehearing and Rehearing En Banc were denied on May 24, 2002.

Petitioners have filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

On October 6, 1982, Shell and Mobil, who owned 87% of the working interest in the McElmo Dome Unit, entered into a Unitization Agreement to more efficiently produce and collect carbon dioxide. Pursuant to the Unitization Agreement, wells would be drilled in the center portions of the field, in rather widely spaced clusters of up to four, rather closely spaced, individual wells. However, before the Colorado Oil and Gas Conservation Commission would approve the Unitization Project, it required the written consent of 80% of the cost free interest owners. To obtain the required percentage approval, Shell and Mobil sent each of the overriding royalty interest owners a solicitation letter accompanied by a Ratification Form, a copy of the Unit Agreement, and a color brochure entitled "McElmo Dome Carbon Dioxide Recovery Project: A Program for Unit Operations". The brochure described the emerging markets for carbon dioxide and explained how unitization worked. Three pages of the brochure were devoted to answering specific questions, including the following questions and answers found on pages 6 and 8:

> **Who will pay for installing and operating this program?**
>
> All installation and operating costs will be paid by the working interest owners. There will be no charges to the royalty owners.
>
> **What is the price for CO2?**
>
> The sales price provided in the contract with the Denver Unit is $0.90 per thousand cubic feet of 12/1/81. This price will fluctuate up or down based on the price of West Texas Crude. Based on December 1982 oil prices, the sales price is about $0.85 per thousand cubic feet.

Will the royalty owners of interest in this unit have to pay for the pipeline, transportation, or injection of CO2 in West Texas?

No.

The solicitation letter was dated January 6, 1983 and requested ratification by February 15, 1983 due to critical timing of the project. Petitioners Ptasynski and Gray are owners of overriding royalty interests in federal leases and one state lease within the unit area and relied upon the solicitation materials and signed the ratification forms. After the required percentage of the cost free interests had been secured, the McElmo Dome Unit was formed April 1, 1983. Shell was the Unit Operator. The Unit Agreement, section 10, gave the Unit Operator the exclusive right, privilege and duty of exercising all rights of the parties necessary for producing, allocating and distributing unitized substances and proceeds. Section 9 of the Unit Agreement required all costs to be paid and borne by the Working Interest Owners and section 13 required the Unit Operator, Shell, to make distribution to and provide accurate accounting to royalty owners in the Unit. Section 14 of the Unit Agreement provided the Unit Operator was jointly liable with the working interest owners for the proper settlement of royalty and sections 18 and 19 conformed all contracts within the Unit to the terms of the Unit Agreement and covenants were treated as running with land and binding on successors in interest. Section 22 of the Unit Agreement designated the Unit Operator as the agent to represent all interests in the Unit. The Trial Judge found (App., p.34a) "Since there is no market for carbon dioxide in Colorado, Defendants have calculated tailgate value by taking the market price of the carbon dioxide in West Texas and subtracting the cost of transporting the gas from Colorado to West Texas." Cortez Pipeline Company is the general partnership formed by Shell and Mobil to own the pipeline that was displayed in the color brochure and to whom the transportation charges were paid.

Since 1984, Shell and Mobil sent monthly checks and detail statements to Petitioners that purported to report the gross royalties paid attributable to their interests. The forms and statements failed to disclose that Shell and Mobil were deducting their transportation charges to West Texas from the Denver Unit contract prices they received. In some instances the transportation charges deducted by Shell and Mobil exceeded the sales prices contained in the contracts that generated "negative priced sales contracts". Shell and Mobil sold CO2 allocable to Petitioners' overrides for a sales price that was less than the transportation costs they charged for delivery to the commercial market in West Texas. The transportation charges were paid by Shell and Mobil to their "partnership".

Shell and Mobil concealed their deductions of the transportation charges to West Texas. Shell and Mobil failed to notify Petitioners, overriding royalty owners, that Shell and Mobil offset royalties under other contracts with positive values to make themselves whole from their negative priced sales contracts. Shell and Mobil's records show that for May 1994 production, Mobil received contract rates of $.90/mcf for its share of McElmo Dome CO2 and paid the landowner (Minerals Management Service) a net royalty of $.45/mcf. At the same time Mobil paid the Petitioners who were overriding royalty owners on the same federal leases and production less than $.003/mcf. The royalty price to the landowner was over 150 times the price used for Petitioners due to secret negative priced sales contracts.

Petitioners' case was tried and they obtained a Final Judgment for their damages. Petitioners were awarded declaratory judgment relief that the transportation charges to West Texas would no longer be deducted from their overriding royalties. Shell and Mobil appealed and Petitioners cross-appealed. On February 13, 2002, the judgment in Petitioners' favor was reversed and their Petitions for Rehearing Denied on May 24, 2002.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT COURT OF APPEALS IS COMPLICIT IN THE CREATION OF THE GREATEST OIL AND GAS ACCOUNTING SCANDAL TO DATE – THE "NEGATIVE ROYALTY".

To Petitioners' knowledge, no court has ever sanctioned the use of a negative royalty or a negative priced sales contract in the oil, gas or carbon dioxide context until the decision of the Fifth Circuit Court of Appeals in this case. The terms "negative priced sales contract" and "negative royalty" are oxymorons and difficult to explain in normal parlance. The terms have no meaning in connection with overriding royalty interests in federal leases or Colorado leases. The terms have no meaning in the federal or Colorado law involving unitization. As explained in the Colorado unitization statute, an overriding royalty interest is a cost free interest. It is an interest free of the costs of exploration or development. Petitioners did not create negative priced sales contract; they are the victims of the practices created by Shell and Mobil. Shell, the McElmo Dome Unit Operator, and Mobil secretly created the practice of using "negative priced sales contracts" to value Petitioners' overriding royalty interests in the McElmo Dome Unit.

Had Shell and Mobil merely stolen the Petitioners' carbon dioxide from the McElmo Dome Unit, the Petitioners would have received nothing. That would have been using zero priced sales contracts. What Shell and Mobil did in valuing Petitioners' carbon dioxide was to not only steal the gas allocable to their overriding royalty interests in some contracts, but also take amounts that were owed to Petitioners under other contracts to reimburse Shell and Mobil for their transportation charges to the commercial market in West Texas.

Negative priced sales contracts are agreements in which the sales price of the McElmo Dome carbon dioxide was less than the transportation charges to the delivery point in West Texas. A negative priced sales contract could result from a transaction in which the producer/shipper, the Unit Operator Shell or Mobil, agreed to supply carbon dioxide for a reduced price and ownership of a working interest in the oil field in which the carbon dioxide was used. Shell and Mobil would keep the oil field working interests for themselves and limit the royalty and tax payments to the nominal price. This was a great technique for Shell and Mobil because they did not share any of the oil field working interest with the overriding royalty owners whose carbon dioxide made the transaction possible. It was disastrous for the royalty owner because all of the value of the sales contract was consumed by the transportation charges to market and any deficit was deducted by Shell and Mobil from the value of other contracts. Concealing this fact from the overriding royalty interest owners was easy because Shell, as the Unit Operator, had sole possession of the books and records. Both Shell and Mobil deliberately concealed their use of negative priced sales contracts from overriding royalty owners.

The case was tried in August of 1999 at which time the Colorado Supreme Court had not issued its definitive statement on marketability as it related to oil and gas agreements as was later contained in *Rogers v. Westerman Farm Co.*, 29 P.3d 887(Colo. 2001). The Trial Judge had determined that *Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo. 1994) might have allowed transportation charges to the West Texas market to be shared and proceeded to trial on the issue (App., p. 38a). However, the Court determined as a fact that there was no market for the carbon dioxide in Colorado and the carbon dioxide had to be transported to the West Texas market. The Court found that from 1984 to present Shell and Mobil determined the value of the Petitioners' overriding royalties by taking the market price of the carbon dioxide in West Texas and subtracting the cost of transporting the gas from Colorado to West Texas (App., p. 34a).

While the case was on appeal, the Colorado Supreme Court issued its dispositive decision concerning the question of marketability. In *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) the Colorado Supreme Court defined marketability, as required under the implied covenant to market, to mean that gas was marketable when it was in the physical condition such that it is acceptable to be bought and sold in the commercial market place, and in the location of the commercial marketplace, such that it is commercially saleable in the oil and gas marketplace. The Colorado Supreme Court explained that its decision was in further explanation of its prior holdings in *Garman* and *Davis v. Cramer*, 808 P.2d 358 (Colo. 1991) which were based upon the implied duty to market imposed on working interests in Colorado oil and gas leases. The court held it made no difference whether short distance or long distance transportation costs were involved; it was the lessee's obligation to transport to the commercial marketplace.

Rather than follow the controlling authority of the Colorado Supreme Court, the Fifth Circuit Court of Appeals created a fact upon which to base its holding that *Rogers* did not apply. The "fact" created by the Fifth Circuit was that "the district court clearly determined that the gas was marketable *before* the 500 mile transportation to Texas." Appendix, p. 25a, footnote 7. This newly created "fact" was in direct opposition to the factual findings of the Trial Court. In truth, the Trial Court had determined **as a fact** that McElmo Dome carbon dioxide was not marketable in Colorado and Shell and Mobil had calculated value by taking the market price of the carbon dioxide in West Texas and subtracting the cost of transporting the gas from Colorado to West Texas. This fact was stated on page 4 of the Background Facts of the Court's June 16, 1999 opinion as follows:

> "Since there is no market for carbon dioxide in Colorado, Defendants have calculated tailgate value by taking the market price of the carbon dioxide in West Texas and subtracting the cost

of transporting the gas from Colorado to West Texas."

It was undisputed that McElmo Dome carbon dioxide was not marketable in Colorado. It is also indisputable that the cost of transporting McElmo Dome carbon dioxide to the location of the market place in West Texas is required to be borne by the working interest owners, Shell and Mobil, and not deducted from the Petitioners' overriding royalties. *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001).

By creating new facts, the Fifth Circuit Court of Appeals have sanctioned the use by Shell and Mobil of their "negative priced sales contracts" and the negative royalty created by their use. To illustrate the result of negative priced sales contracts it is helpful to note that all of Petitioner Ptasynski's overriding royalty interests are in federal leases contained within the McElmo Dome Unit. Petitioner Gray's overrides are also in federal leases and one Colorado state lease. As a result the same carbon dioxide produced for the United States was also produced for Petitioners but the royalty prices used for Mineral Management Service ("MMS"), which had agreed to pay transportation, was substantially more than the royalty prices used for Petitioners' overriding royalty interests based upon the exact same leases, contracts and production. While the United States had agreed to pay transportation charges, it restricted the post production costs charged by Shell and Mobil and would not allow negative priced sales contracts. However, Shell and Mobil never disclosed they were deducting transportation charges to West Texas to Petitioners. Shell and Mobil secretly deducted their marketing and transportation charges to West Texas from the delivered price for Petitioners' overriding royalty interests that generated a gross disparity of royalty price. In May of 1994 Mobil received a delivered contract price of $0.90/mcf for its McElmo Dome carbon dioxide and paid MMS a net royalty of $0.45/mcf. At the same time Mobil paid the overriding royalty owners, on the same leases and contracts and on the same

volume of carbon dioxide produced, a royalty price of less than $0.003/mcf. For the same gas, the royalty owner who had agreed to pay transportation charges to West Texas was paid a royalty price over 150 times greater than the overriding royalty owner who was not to be charged for any transportation.

Shell and Mobil never disclosed to overriding royalty owners that they deducted the McElmo Dome Unit transportation charges to West Texas from the overriding royalty interests. As the Unit Operator, Shell was required by the Unit Agreement to truthfully account for its actions as the fiduciary charged with sole discretion in unit activities. Both Texas and Colorado had royalty reporting statutes that required oil and gas lessees such as Shell and Mobil to report to royalty interests all their deductions from the delivered prices received for the oil and gas produced. Shell and Mobil never disclosed their unlawful deductions. The decision of the Fifth Circuit Court of Appeals has allowed them to continue their practice of concealment. The Fifth Circuit Court of Appeals has become complicit with Shell and Mobil in the creation of the negative royalty by its rejection of the controlling definition of marketability as decided by the Colorado Supreme Court in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001). This Honorable Court should grant this Petition for Certiorari to correct the fundamental departure from universally accepted oil and gas royalty accounting rules caused by "negative priced sales contracts" and "negative royalties" which has been condoned by the Fifth Circuit Court of Appeals.

II. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO FOLLOW THE CONTROLLING TENTH CIRCUIT AUTHORITY GOVERNING FIDUCIARY DUTY FOR CARBON DIOXIDE UNITS AS DETERMINED IN *ATLANTIC RICHFIELD CO. V. FARM CREDIT BANK OF WICHITA*, 226 F.3d 1138, 1162 and 1163 (10th Cir. 2000).

In order for the United States or any interest owner in the McElmo Dome to participate in a field wide unit in Colorado, at least 80% of the working interest (the interests required to pay for unit operations) had to agree to the plan. In addition the working interests had to secure the consent to the Unit formation of owners of at least 80% of the interests in production or proceeds that were free of costs, such as royalty and overriding royalty interests. C.R.S. § 34-60-118(5). If the cost free interests failed to agree to the Unit Agreement, there could be no unit. In this case Shell, the Unit Operator, and Mobil owned more than 87% of the working interest. However, before the Colorado Oil and Gas Conservation Commission would approve the McElmo Dome Unit, Shell and Mobil had to get the written consent of 80% of the cost free interests (App., p. 32a). To accomplish this Shell and Mobil sent their solicitation package to Petitioners requesting their consent to the Unit Agreement. The Unit Agreement gave the Unit Operator, Shell, exclusive possession, use, and control of the Unit properties and required the Unit Operator to perform fiduciary duties for the cost free overriding royalty owners. The Unit Operator had the exclusive right, privilege and obligation of allocating and distributing unitized substances and proceeds. The Unit Agreement provided that the Unit Operator was jointly liable with the working interest owners for the payment and settlement of royalties due overriding interest owners and the Unit Operator was designated as a special agent for all interests within the unit. Under the law of the Tenth Circuit, Shell owed a fiduciary duty to Petitioners as the Unit Operator of the McElmo Dome Unit. *Reserve Oil, Inc. v. Dickson*, 711

F.2d 951, 953 (10th Cir. 1983) and *Britton v. Green*, 325 F.2d 377, 383 (10th Cir. 1963). Shell abused the fiduciary duties it owed under the Unit Agreement by secretly and unlawfully deducting Unit transportation and marketing costs from royalties due overriding royalty owners. Even before the most recent pronouncement of the Tenth Circuit, these actions were sufficient to violate fiduciary obligations of a Unit Operator. *Dime Box Petroleum Corp. v. Louisiana Land and Exploration Co.*, 938 F.2d 1144 (10th Cir. 1991). In addition to the obligations imposed by the Unit Agreement, both Shell and Mobil were bound by the royalty reporting provisions of Texas (V.T.C.A., Nat. Res. Code, § 91.502) and Colorado (C.R.S. § 34-60-118.5(2.3) to truthfully report to Petitioners and all overriding royalty owners all deductions they made to the gross sales prices they received for the oil, gas and carbon dioxide produced from the McElmo Dome. Shell and Mobil violated these duties by their secret deduction of transportation charges to West Texas.

Not only did the Unit Agreement require the Unit Operator to insure that all Unit costs and expenses would be paid and borne by the working interest owners; section 22 of the agreement specifically designated the Unit Operator as the agent for all the interests in the Unit. The agency provision alone falls within the definition of a "fiduciary relationship" under controlling Tenth Circuit law as it relates to Colorado carbon dioxide units. Rather than follow the controlling authority of the Tenth Circuit, the Fifth Circuit Court of Appeals stated "the Tenth Circuit has suggested that the Colorado Supreme Court would probably not impose a fiduciary duty upon unit operators" (App., p. 22a). In fact, the statement by the Fifth Circuit is a complete rejection of the controlling authority of the Tenth Circuit Court of Appeals in *Atlantic Richfield v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1162 n. 12 (10th Cir. 2000) which has created an actual conflict between the Circuit Courts of Appeal.

When the Tenth Circuit Court of Appeals addressed the case of the duty owed by a Unit Operator in a Colorado carbon dioxide unit it reversed a district court summary judgment

finding against fiduciary duty status and directed the lower court to take into account the definition provided by Colorado law for a fiduciary as follows:

> The proceeding on remand should take into account Colorado's definition of a "fiduciary": "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking." *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). Further proceedings should also take into account Colorado's operative definition of a "fiduciary relationship":
>
> A fiduciary relationship exists when one person is under a duty to act for or give advice for the benefit for another upon matters within the scope of their relationship. A fiduciary relationship can arise when one party occupies a superior position relative to another. It may be based upon a professional, business, or personal relationship. (citations omitted).

Atlantic Richfield v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1163 (10th Cir. 2001).

The Fifth Circuit Court of Appeals clearly erred in failing to follow the controlling authority governing fiduciary duty involving Colorado carbon dioxide units provided by the Tenth Circuit Court of Appeals in *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1162 and 1163 (10th Cir. 2000). This Honorable Court must grant this Petition for Certiorari so that it may resolve the conflict between the Circuit Courts of Appeal involving the fiduciary duties owed by a Unit Operator to overriding royalty interests in a carbon dioxide unit formed under Colorado law. C.R.S. § 34-60-118.

III. THE FIFTH CIRCUIT COURT OF APPEALS VIOLATED PETITIONERS' RIGHTS UNDER THE FIFTH AND SEVENTH AMENDMENTS BY CREATING FACTS IN CONTRADICTION TO THE FACTS FOUND AT TRIAL AND BY HOLDING THAT PETITIONERS COULD NOT RELY UPON SHELL AND MOBIL'S WRITTEN REPRESENTATIONS MADE IN THE COLOR BROCHURE WHICH SOLICITED PETITIONERS' CONSENT TO THE UNIT BECAUSE "EACH HAD OVER FORTY YEARS' EXPERIENCE IN THE OIL AND GAS BUSINESS".

Petitioners' case against Shell and Mobil was tried on August 2, 3, and 9, 1999. The Trial Judge had the privilege of reviewing the evidence and the demeanor of all witnesses testifying at trial and he made detailed findings of fact. The Trial Judge held that he did credit the testimony of the two Plaintiffs, the Petitioners. (App., p. 49a). The Court also made credibility decisions on the testimony of the Defendant's witnesses, including their expert witness. (App., p. 54a). The Court described how one defense witness testified that the word "transportation" in the brochure referred only to construction and operation of the pipeline and not transportation through the pipeline which the Trial Judge discredited. The Trial Judge also considered the testimony of another defense witness, Buster Goode, who testified that the brochure only meant the Plaintiffs would not have to pay for the pipeline. The Judge discredited the testimony because it was inconsistent with the plain meaning of the language that the Petitioners had relied upon. The Trial Judge also commented on the testimony of Shell and Mobil's expert witness, Ronnie Platt, who testified that transportation did not refer to the Cortez Pipeline at all and that the brochure and package only concerned the unitization project in Colorado and the Judge rejected the testimony because it was not credible. The Judge found that Petitioners understood the brochure to mean that their overriding royalty payments would be based upon the price at the Denver Unit which was

the delivered price of the carbon dioxide and specifically referenced the testimony of Mr. Gray as to how he calculated the final sales price. After the Judge reviewed the evidence and the witnesses, the Judge determined that Petitioners were entitled to Declaratory relief and were entitled to recover their compensatory damages equal to the difference between the royalty payments they should have received based upon the delivered price in the Denver Unit in West Texas and the royalty price they received after the transportation charges to West Texas had been deducted. (App., pp. 54a and 55a).

A fact the Trial Judge did **not** find was that Petitioners could not rely on Shell and Mobil's solicitation as a matter of law because each of them had over 40 years experience in the oil and gas business in 1982. The reason the Trial Judge did not make such a finding is because it was not true. Neither Petitioner Ptasynski nor Petitioner Gray had 40 years oil and gas experience in 1982 when Shell and Mobil sent out their solicitation package. Furthermore, in 1982 such oil and gas experience would have been completely useless when evaluating the McElmo Dome carbon dioxide unit since Shell and Mobil, as testified to by their witness Buster Goode, were "plowing new ground" and were attempting to do something that "had never been done before".

The fundamental question remains that no person, no matter how experienced, learned, or wise is able to discern a lie until the truth has been disclosed. Shell and Mobil presented a written solicitation to the Petitioners in 1983 to get their consent to the formation of the McElmo Dome Unit. This was required by the Unit Agreement, Colorado law and by order of the Colorado Oil and Gas Conservation Commission. The solicitation, which included their color brochure, was made pursuant to the specific authority of the Unit Agreement which had been executed by Shell and Mobil and imposed fiduciary duties upon Shell and Mobil to tell the truth. As found by the Trial Judge, the Petitioners relied upon the solicitation materials and for 20 years Shell and Mobil have illegally deducted transportation charges to the Denver Unit in West Texas in violation of Colorado law and the terms of the

Unit Agreement. Shell and Mobil concealed their transportation charge deductions even though the law of both Texas and Colorado required Shell and Mobil to disclose all deductions from the delivered price of carbon dioxide produced. Shell, the Unit Operator, and Mobil concealed the transportation charge deductions and told Petitioners that they were being paid gross royalties when, in fact, Shell and Mobil were secretly deducting transportation charges and only paying a net royalty to Petitioners. These facts were found by the Trial Judge after he tried the case. The creation of "facts" by the Fifth Circuit in contradiction to the facts found by the trier of fact in order to reverse the Trial Court violates the Petitioners' rights to due process of law under the Fifth Amendment. The creation of "new" facts not found at trial is a gross departure from the appellate review required by the rules of common law which are guaranteed to every citizen under the Seventh Amendment. This Honorable Court should grant this Petition for Certiorari to correct this important question of federal appellate law that has been improperly utilized by the Fifth Circuit Court of Appeals.

CONCLUSION

THEREFORE, Petitioners HARRY PTASYNSKI and W.L.GRAY & CO. request of this Court that it GRANT their Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit and reverse the decision of the Fifth Circuit and affirm the District Court's award of damages and declaratory judgment relief.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document.)
No. 99-11049

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HARRY PTASYNSKI and W.L. GRAY & CO.,
Plaintiffs-Appellees-Cross-Appellants,

vs.

SHELL WESTERN B&P, INC., ET AL
Defendants,

SHELL WESTERN B&P, INC., SHELL OIL COMPANY,
and MOBIL OIL CORPORATION,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

Filed February 13, 2002

Before GARWOOD, PARKER, and DENNIS, Circuit Judges.
GARWOOD, Circuit Judge;*

Defendants-appellants-cross-appellees Shell Western E&P Inc., Shell Oil Co. (collectively "Shell") and Mobil Oil Corp. ("Mobil") appeal the district court's judgment for plaintiffs-appellees-cross-appellants Harry Ptasynski (Ptasynski) and W.L. Gray & Co. ("Gray") as to their negligent misrepresentation and declaratory judgment claims. Ptasynski and Gray appeal the district court's finding for defendants as to their contract and negligence per se claims and also complain that the award of prejudgment interest to them should have been based on Colorado law. We affirm in part and reverse in part.

Facts and Proceedings Below.

In the 1970s, due to the rising costs of oil, petroleum companies began to investigate the use of carbon dioxide to increase oil output from older fields. They discovered that when carbon dioxide is injected under sufficient pressure into an older field (CO_2 flooding), it mixes with oil underground, dislodging it from the surrounding rock and enhancing its recovery. This process is known as tertiary or enhanced oil recovery (EOR). Oil fields in West Texas were considered prime candidates for EOR.

The largest carbon dioxide field capable of supplying those West Texas fields was the McElmo Dome area, located in Montezuma and Dolores counties, Colorado. As of 1981, the McElmo Dome area was divided into seven small units. Together, Shell and Mobil Producing Texas & New Mexico Inc. (MPTN), a Mobil subsidiary, owned 87% of the total working interest in the McElmo Dome area. Shell and Mobil believed that the abundant carbon dioxide reserves of the McElmo Dome area could be harvested more efficiently if the area was operated as a single unit. Throughout 1962, Shell and Mobil took steps to realize their vision for the McElmo Dome area. A partnership called Cortez Pipeline Co. was formed to construct, own and operate a 500 mile pipeline that would carry carbon dioxide from McElmo Dome to fields in West Texas.[1] Shell also entered into a contract with the Denver Unit in West Texas for the sale of a large volume of carbon dioxide.[2]

Finally, Shell tiled an application with the Colorado Oil & Gas Commission to operate the McElmo Dome area as a single Unit. MPTN supported this application. The Commission held public hearings on Shell's application on October 18-19, 1982. At the conclusion of these hearings, the Commission preliminarily approved Shell's application, but required Shell to obtain the consent of 80% of the cost-bearing working interest owners and 80% of the non-cost bearing royalty interest owners. Because Shell and MPTN collectively owned 87% of the total working interest, the first

requirement was instantly satisfied.

Prior to the hearing, Shell had obtained the preliminary approval of the United States Minerals Management Service (MMS), which owned 76% of the total royalty interest. Thus, Shell had only to obtain consent of an addition 4% of the total royalty interest in order to secure final approval from the Commission.

In order to obtain such consent, Shell, on January 6, 1983, sent a package of materials to the royalty interest owners. The package included: 1) a brochure entitled "A Program for Unit Operations," which was designed to provide an overview of the project; 2) the Unit Agreement for the proposed McElmo Dome Unit; and 3) a ratification form by which the royalty interest owners could manifest their assent to the Unit Agreement. The brochure contained, inter alia, information in the form of questions and answers. Among these were the following:

> "What is the price for CO_2?
>
> The sales price provided in the contract with the Denver Unit is 90 per thousand cubic feet as of 12/1/81. This price will fluctuate up or down based on the price of West Texas crude. Based on December, 1982 oil prices, the sales price is about 85 per thousand cubic feet.
>
> Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of CO2 in West Texas?
>
> No."

Harry Ptasynski and Wilfred L. Gray[3] are independent geologists with over forty years of experience in the oil and gas industry. In the 1960s and 1970s, both acquired leases in the McElmo Dome area—Ptasynski from the federal government and Gray from the federal government and the

state of Colorado. Each assigned his lease to others but retained an overriding royalty interest. Each received Shell's package and signed and returned the ratification form. Together, Ptasynski and Gray own about 0.05% of the total royalty interest in McElmo Dome. Ultimately, Shell obtained the consent of 92.5% of the total royalty interest. As a result, the McElmo Dome Unit became effective on April 1, 1983, and production of carbon dioxide began in December 1983. Ptasynski and Gray have been receiving royalties from this production since 1984. Such royalties were based on the carbon dioxide's value before being transported to West Texas. Defendants generally determined this value by in effect subtracting the cost of transportation from the delivered sales price. Plaintiffs claim they were not aware of this until fellow royalty interest owner George Bailey filed his own lawsuit on March 11, 1997.

Plaintiffs filed their complaint on May 21, 1997. The gravamen of the complaint is that, contrary to the representation in the brochure, plaintiffs were, in effect, charged for transporting the carbon dioxide to West Texas. The complaint alleges that defendants are liable for: 1) willfully filed fraudulent tax documents in violation of 26 U.S.C. 7434; 2) fraud; 3) fraudulent concealment; 4) negligent misrepresentation; 5) civil conspiracy; 6) breach of contract; and 7) negligence per se. The complaint also sought a judicial declaration that, inter alia, "as to all future production from the Unit, [defendants] shall not be permitted to deduct any transportation costs from the royalty payments made to plaintiffs."

Originally, the complaint named only the Shell defendants. Mobil and Cortez Pipeline Co. were added in February 1998, but the latter was dismissed without prejudice in September 1998. Eventually, the parties filed cross-motions for summary judgment. The net result was that plaintiffs' claim under 26 U.S.C. § 7434 and their attempt to assert a substantive claim for fraudulent concealment were dismissed with prejudice.[4] All other claims were bench tried on August 2, 3 and 9, 1999. The district court found for defendants on

the fraud, civil conspiracy, contract and negligence per se claims and for plaintiffs on the negligent misrepresentation and declaratory judgment claims. The district court ordered Shell to pay Ptasynski $202,910.61 and Gray $329,029.02, and Mobil to pay Ptasynski $118,409.[5]

The defendants appeal the district court's judgment for plaintiffs as to their negligent misrepresentation and declaratory judgment claims. The plaintiffs appeal the district court's finding for defendants as to their contract and negligence per se claims and complain that it improperly applied Texas, instead of Colorado, law in awarding prejudgment interest.

Discussion

I. Standard of Review

Only the claims disposed of in the bench trial are at issue in this appeal. "The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de nova." Kona Technology Corp. v. Southern Pacific Transportation Co., 225 F.3d 595, 601 (5th Cir. 2000):

II. Negligent Misrepresentation

A. Discovery Rule

The alleged negligent misrepresentation (distribution of the brochure) occurred in January 1983, over fourteen years before the plaintiffs filed their original complaint. The statute of limitations for negligent misrepresentation claims is two years. HECI Exploration Co. v. Neel, 982 S.W.2d 881, 885 (Tex. 1998). The district court found that Texas's discovery rule applies to claims of negligent misrepresentation and that, because plaintiffs did not learn how the defendants were computing their royalties until they became aware of the Bailey lawsuit in 1997, the discovery rule saved plaintiffs' negligent misrepresentation claim.

It is uncertain whether Texas's discovery rule applies to negligent misrepresentation claims. In Kansa Reinsurance Co. v. Congressional Mortgage Corp. of Texas, 20 F.3d 1362, 1372 (5th Cir. 1994), this Court held that Texas law precludes application of the discovery rule to claims of negligent misrepresentation. Since Kansa was decided, the Texas Supreme Court has adopted a categorical approach to application of the discovery rule, but has not clarified whether the rule applies to a claim of negligent misrepresentation. HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886 (Tex. 1998).. The test is whether the nature of the injury renders it inherently undiscoverable and objectively verifiable. Id. At least one Texas court of appeals has held that the discovery rule can apply to a negligent misrepresentation claim, Matthiessen v. Schaefer, 27 S.W.3d 25, 31 (Tex. App. 2000), while another acknowledges that that question has not been settled, Davis v. Minnesota Life Insurance Co., 2000 WL 795887 *4 n.3 (Tex. App. -Austin, 2000) (unpublished). The district court did not acknowledge any of this authority or discuss why it believed the Texas Supreme Court would apply the discovery rule to claims of negligent misrepresentation.

However, even it the discovery rule applies to negligent misrepresentation claims, accrual of the cause of action is only delayed until the plaintiff knew, or in the exercise of reasonable diligence should have known, of the facts giving rise thereto. HECI, 982 S.W.2d at 886. As mentioned, the district court stated that the plaintiffs did not actually discover how their royalties were calculated until 1997. The district court did not address whether the plaintiffs, in the exercise of reasonable diligence, should have discovered the facts giving rise to their claims any earlier. However, remand for such a finding is not necessary where, as will be shown here, tile record demonstrates that plaintiffs' negligent misrepresentation claim is without merit. Some of the facts that show the claim's lack of merit also indicate that the plaintiffs should have known how their royalties were computed years before 1997. We also note that under the Texas Supreme Court's recent decision in Wagner & Brown

Ltd. v. Horwood, 585 S.W.3d 372 (Tex. 2001), it is highly doubtful that plaintiffs' injury was inherently undiscoverable as required for the discovery rule to be applicable.

B. Merits

The elements of negligent misrepresentation are: 1) representation made by defendant in the course of his business or in a transaction in which he has a pecuniary interest; 2) the defendant supplies false information regarding an existing fact for the guidance of others in their business; 3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and 4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) . Defendants assert that the district court's conclusion that the second and fourth elements were satisfied was clearly erroneous.

1. False Information

Defendants contend that the question and answer alleged to be false was, in fact, true. The question and answer at issue amounts to a representation that, under the proposed Unit Agreement, the royalty interest owners would not have to pay for three things 1) construction of the pipeline; 2) transportation at carbon dioxide to West Texas; and 3) the use of the carbon dioxide to enhance oil recovery in West Texas. The district court held that by deducting "transportation costs prior to calculating royalty interest payments [defendants were] in effect requiring the plaintiffs to pay for the transportation cost."

We begin by offering the following illustration. Suppose the plant tailgate value of carbon dioxide is $1.00 per unit, the cost of transporting it to the buyer $.30, the downstream price $1.50 and the overriding royalty interest 10%.[6] The royalties based on the tailgate and downstream values are $ .10 and $.15, respectively. The plaintiffs' share of the cost of transportation is $.05. The royalty the defendants

paid to the plaintiffs corresponds to the $.10 figure in this example.

The defendants contend that, in calculating plaintiffs' royalty, they have not charged plaintiffs for their share of transportation costs. Instead, they claim that the proper point for valuation of plaintiffs' overriding royalty interests is the tailgate, and that it is proper to arrive at the tailgate value by subtracting the total cost of transportation from the downstream value. This is known as the "net-back" method, and it is not uncommon for working interest owners to employ it exactly as the defendants did.

The plaintiffs maintain, and the district court found, that they were charged for their share of transportation costs. As is clear from our example, the net-back method yields the same royalty (10% x ($1.50 - $.50) = $.10) as basing the royalty upon the downstream price or value (10% x $1.50 = $.15) then charging the plaintiffs for their share of transportation costs (10% x $.50 = $.05)

Thus, there is merit in the plaintiffs' contention, and the district court's finding, that the plaintiffs were charged for transportation. However, it is questionable whether a reasonable overriding royalty interest owner would have understood the brochure to promise a greater royalty than the plaintiffs here received. Several factors place in doubt the reasonableness at plaintiffs' interpretation of the brochure. As discussed in greater detail in Part II. B.2, infra, these factors also render unjustified any reliance upon plaintiffs' interpretation.

Section 14 of the Unit Agreement stated that it did not change how working interest owners settle for royalty interests and that such settlements would be in accord with existing contracts, laws and regulations. The leases between the plaintiffs and defendants are silent as to how post-production costs are to be allocated. The plaintiffs are unable to point to any authority that establishes that working interest owners cannot share the cost of transportation of

marketable gas with non-working interest owners."

In addition, the brochure provided that under the Denver Unit contract, the only contract for the sale of McElmo Dome Carbon dioxide that Shell had negotiated at the time the plaintiffs were asked to approve the formation of the Unit, the price of carbon dioxide was $ .90 and would fluctuate according to the price of oil. As noted above, the very next statement in the brochure asserted that plaintiffs would not be charged for the cost of transportation of the carbon dioxide to West Texas. Together, these representations imply that the plaintiffs were to be paid a royalty based on the sales price of $.90 with no charges for transportation deducted therefrom. Plaintiffs were, in fact, paid a royalty based on the $.90 price (which had decreased to $.79, in accordance with the stated formula relating the $ .90 price to changes in the price of oil, by the time plaintiffs' received their first royalty payment). The Denver Unit contract provided that the buyer would, in addition to the $.90 figure referenced in the brochure, pay Shell for the cost of transporting the carbon dioxide through the pipeline. Thus, the $.90 figure quoted in the brochure was net of any charge for transportation.

The representation concerning transportation charges is best understood as clarifying that the $.90 figure is the one upon which royalties would be based. Plaintiffs' interpretation of the brochure produces the absurd result that they are entitled to a windfall, i.e. royalty based on the downstream price without being charged for transportation if Shell sells the carbon dioxide after being transported, but not if Shell structures the deal so that the buyer takes possession of the carbon dioxide before it is transported.

The misrepresentation question is not entirely free from doubt because, when read in isolation, the complained-of section of the brochure could be viewed as telling plaintiffs they would not be charged for transportation, and, as we have explained, the plaintiffs were charged for transportation. But because we find, in Part II.B.2, infra, that

the district court's conclusion regarding the justifiable reliance element was clearly erroneous, we do not need to decide whether the brochure contained a misrepresentation. Accordingly, for purposes of evaluating the propriety of the district court's ultimate conclusion that the defendants were liable to plaintiffs for the tort of negligent misrepresentation, we will assume, without deciding, that the brochure did contain a misrepresentation.

2. Justifiable Reliance

a. Actual Reliance

The essence of plaintiffs' negligent misrepresentation claim is that the statement in the brochure about transportation costs induced them to approve the Unit Agreement. In such a case, the necessary element of reliance.[8] requires plaintiffs to prove that but for the presence of this statement in the brochure they would not have approved the Unit Agreement-i.e., that if the brochure had not contained that statement they would not have approved the Unit Agreement. See, e.g., Clardy Mfg. Co. v. Marine Midland Business Loans, 88 F.3d 347, 359 (5th Cir. 1996);[9] Haralson v. E. F. Hutton Group, 919 F.2d 1014, 1030 (5th Cir. 1990) (". . . the test for materiality is 'whether the contract would have been signed by the plaintiff without such representation having been made'" ,.quoting Adickes v. Andreoli, 600 S.W.2d 939, 946 (Tex. Civ. App. 1980)). Because in this bench trial testimony plaintiffs, when interrogated about the matter, declined to state that they would not have approved the Unit Agreement, and the other evidence does not support such a conclusion but rather suggests the contrary, the trial court's finding that plaintiffs relied on the brochure statement is either clearly erroneous or based on an erroneous view of what plaintiffs must establish to satisfy the reliance element of this negligent misrepresentation claim.

(i) Ptasynski

At trial, Ptasynski testified that the question and answer in the brochure did not cause him to believe that by entering into the Unit Agreement, he would receive any "better deal" as to how his royalties were calculated. Ptasynski also testified that there were several reasons he entered into the Unit Agreement, among them that in an undivided unit (like the proposed McElmo Dome Unit) the life of the leases in the unit is extended for the life of the unit and that he was glad to be a part of such an ambitious project. The following exchange occurred during cross-examination at trial:

> Q. (By Mr. Aronowitz) All right, sir. You didn't think, when you got this unit agreement and brochure and letter, that you were going to be given a better deal on your - on how royalties would be calculated under your overide, did you?
>
> A. (Mr. Ptasynski) A better deal?
>
> Q. Right.
>
> A. No, I certainly did not.
>
> Q. You ratified for the reasons we talked about.
>
> A. Among others, right.
>
> Q. All right. And we can go through but they're in the brochure and you've already talked about them, And that's what you perceived to be the consideration you were to receive for ratifying the unit agreement, right?
>
> A. Participation of the unit, yes.
>
> Q. Okay. So you would have ratified the

unit agreement even if that question and answer, "Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of Co2 in West Texas," even if that question and answer hadn't been there you would have ratified this unit agreement, wouldn't you?

A. I'm not sure. I'm not sure of that because, like I said, this is a different kind of unit, totally different kind of unit. If you had stated in the brochure that there's a contract price and then there's a transportation cost and we're not going to tell you what the transportation costs are, I may not have signed it. I may have sold my interest or got a bunch of the royalty owners together and said, hey, we don't have to sign this. This is a bad deal. I could have done that. I don't know.

Q. Well, at least we know that you didn't ratify the unit agreement because you thought the brochure enlarged your rights under the overriding royalty interest you held, right?

A. Had enlarged?

Q. That's right.

A. No, I never expected to have them enlarged. I expected to be paid what I'm supposed to be paid and what - in the manner that the bureau [sic] — that the brochure states, no charge for transportation cost.

Q. That question and answer - I just want to make sure I have your testimony precise on this. "Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of C02 in West Texas?" Answer, "No."

A. Right.

Q. That question and answer did not change any existing belief you had, when you received the brochure, concerning the basis upon which you thought you were entitled to be paid royalty, correct?
A. It didn't change anything because I expected to be paid my 3 and a half percent of the proceeds without any deduction for transportation costs. (emphasis added)

This testimony was not retracted or modified. Given that the Ptasynski was unable to testify that, absent the alleged misrepresentation, he would not have ratified the Unit Agreement, the district court's finding that the reliance element was satisfied as to plaintiff Ptasynski was clearly erroneous.

(ii) Gray

Gray, like Ptasynski, testified on cross-examination that prior to receiving the brochure he believed his royalty interests entitled him to be paid royalties on the downstream price of carbon dioxide without being charged for transportation. During Gray's cross-examination, the following exchange took place;

Q. (By Mr. Aronowitz) I just want to make it clear, Try it again. You already believed that transportation would not be deducted before you got the brochure?

A. (By Mr. Gray) That's correct.

Q. Okay. And you didn't rely on anything Shell told you in the brochure that you didn't already believe at the time that you executed the ratification and consent of the McElmo Dome Unit agreement.

A. When I looked at it I said, by golly, that's right. Even they say so. You're right. I didn't - it just reaffirmed what I already thought was probably true

Q. So you would have ratified the unit agreement even if that question and answer about transportation hadn't been in there, correct?

A. Depend on whether or not you put the statement in there we're going to take transportation charges out and it may be _ you may get little or nothing than I may not have signed it. If you had been truthful and said we are taking them out, then I might not have signed it. But you're saying if you just left it out completely?

Q. Take it out.

A. Take it out. I wonder. Maybe. I don't know. This is 15 years ago. I might wonder why they left that statement out with all the things that they're saying, you won't be paying for this and you won't be paying for that. (emphasis added)

Again, this testimony as not modified or retracted. Gray also testified that, after figuring the royalties he would receive based on the brochure's description of the Denver Unit contract, he believed the Unit Agreement was a "good deal". It is undisputed that the brochure's representations concerning the Denver Unit contract, upon which Gray based his conclusion that the Unit Agreement was a "good deal", were truthful: the royalty on the sales under the Denver Unit contract was paid upon the therein stated price, as represented in the brochure, without any deduction from that price for transportation costs.[10] As with Ptasynski, the trial evidence does not support a finding that, but-for the alleged

misrepresentation, Gray would not have ratified the Unit Agreement.

Accordingly, the district court's finding that the reliance element of plaintiffs' negligent misrepresentation claim was satisfied was clearly erroneous.

b. Justifiable Reliance

"Texas law requires that a plaintiff claiming negligent misrepresentation prove that its reliance was justifiable. - . . the reliance must be reasonable." Scottish Heritable Trust v. Peat Marwick Main & Co., 81 P.3d 606, 615 (5th Cir. 1996). Accord Clardy, 88 F.3d at 358.11 Where the evidence does not support a finding that the plaintiff's reliance was justified and reasonable, this court, and the Texas courts, have not hesitated to hold that the defendant was entitled to judgment as a matter of law on the negligent. misrepresentation claim. See, e.g., Scottish Heritable Trust, 81 F.3d at 615 ("We therefore hold as matter of law that if SHT did indeed rely on Peat Marwick's audit reports with respect to its stock purchases following the initial acquisition, such reliance was simply unjustified"); Clardy, 88 F.3d at 358-59 ("When viewed against all of the surrounding circumstances and the plaintiff's business experience, Clardy Manufacturing's reliance on Norvet's representation was, as a matter of law, unjustified"); Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 142 (Tex. App.-Houston (l4thDist.) 1999; writ denied) ("Holt's reliance was not reasonable or justified as a matter of law"); Bluebonnet Sav. v. Grayridge Apt. Homes, 907 S.W.2d 904, 909 (Tex. App.-Houston (1st Dist.) 1995; writ denied) ("no evidence of justifiable reliance by a reasonable business person . . . A reasonable business person, especially one with Mr. Haney's experience . . . would not reasonably rely on it"); Airborne Freight v. C.R. Lee Enterprises, 847 S.W.2d 289, 297 (Tex. App. -El Paso 1992; writ denied) ("we find that Lee could not have justifiably believed that Airborne would continue to employ the delivery service. . ."). Finally, "[t]he justifiableness of the reliance is judged in light of the plaintiff's intelligence and experience." Scottish Heritable Trust, 81 F.3d at 614; Clardy, 88 F.3d at 358 (same). See also

Bluebonnet Sav., .907 S.W.2d at 909. Ptasynski and Gray each had over forty years' experience in the oil and gas business. To the extent that plaintiffs may have relied on the alleged misrepresentation, such reliance was, as a matter of law, not justified.

First, in the October 1982 hearing before the Commission (of which plaintiffs were given notice), Shell clearly stated that nothing in the Unit Agreement would alter existing royalty arrangements between overriding royalty interest owners and working interest owners, that working interest owners would be responsible for paying royalties in accordance with their leases or assignments from the overriding royalty interest owners, and that the Unit Agreement did not contain any provision as to how the carbon dioxide would be valued. Section 14 of the Unit Agreement plainly states that "[s]ettlement for Royalty Interest not taken in kind shall be made by Working Interest Owners responsible therefor under existing contracts, laws and regulations" -The message from Shell was clearly that the Unit Agreement did not provide any information concerning any of these issues. Plaintiffs' reliance on the brochure for any information as to the substance of those arrangements was unjustified. Under these circumstances, it was, as a matter of law, unreasonable for two experienced oil men such as plaintiffs to rely on the statement in the brochure as meaning anything more than that royalty on sales under the Denver Unit contract would be calculated on the basis of that contract's $.90 per m.c.f. price (as adjusted for fluctuations in the price of oil) without deduction train the $.90 figure for transportation (or other) costs.

A basic understanding of the Denver Unit contract is incompatible with justifiable reliance by plaintiffs upon the alleged misrepresentation. Plaintiffs contend that they are entitled to royalties based on the proceeds of Shell's sale of carbon dioxide and that when Shell sells downstream but uses the net back method to calculate royalty, it is wrongfully charging plaintiffs for transportation in contravention of the brochure. At the time the Unit Agreement was approved, the

Denver Unit contract was Shell's only downstream contract for the sale of McElmo Dome Unit carbon dioxide. The brochure accurately stated the base price for carbon dioxide, which was $. 90, and that this price would fluctuate with the price of crude oil. At the October 1982 hearing, Shell stated that the Denver Unit operator was paying Cortez Pipeline Co. $.50 per mcf to transport the carbon dioxide from McElmo Dome to the Denver Unit. Section 4.2 of the Denver Unit contract clearly states that tariff reimbursement is in addition to the $.90 per mcf price for the carbon dioxide. Thus, the $ .90 per mcf price that the brochure referred to and which rendered the Unit Agreement a "good -deal" (in the words of plaintiff Gray,), represented the McElmo Dome Unit plant tailgate value of carbon dioxide under the Denver Unit contract. As the gas was marketable at that point, that $.90 per m.c.f. tailgate value was the appropriate basis on which to calculate royalty under the leases and assignments giving rise to plaintiffs' overriding royalty.

Section 5.1 of the Denver Unit contract provides that "the point at which title to the carbon dioxide delivered hereunde shall pass from Seller to Buyer, shall be the flange or weld connecting the facilities of Cortez Pipeline Company with the facilities of Buyer, and such point is herein called the 'Delivery Point'." Under the "good deal" Denver Unit contract, Shell was selling downstream and, in ultimate economic effect, calculating royalty via the net-back method. Plaintiffs were, by their own standards, being charged for their share of transportation under the Denver Unit contract.

Shell, as it stated it would at the hearing and in the brochure, thereafter continued to seek other buyers for McElmo Dome Unit carbon dioxide. Some of these contracts are structured differently than the original Denver Unit contract. In these contracts, the only price mentioned represents the downstream value of carbon dioxide. The harm of which plaintiffs complain is Shell's deduction of that part of the downstream value that constitutes the cost of transportation before plaintiffs' royalties are calculated. However, provided the amount deducted for transportation is

reasonable, plaintiffs remain in exactly the same position they enjoyed under the "good deal" that was the Denver Unit contract.

Any reliance by plaintiffs on the brochure for an arrangement more favorable than the "good deal" Denver Unit contract was as a matter of law unjustified.

3. Causation

Even if plaintiffs had justifiably relied on the brochure in ratifying the Unit Agreement, it is undisputed that all that was required for the Unit Agreement to go into full effect was approval of Shell and Mobil and 80% of the total royalty interest, that Shell had already received consent of 76% of the royalty interest when the brochure was sent out and ultimately secured consent of 92 .5% of the royalty interest, and that plaintiffs, combined, possessed less than 0.05% of the royalty interest. First, neither Ptasynski nor Gray testified at trial that he would have been motivated to oppose the Unit Agreement if the brochure had been silent as to transportation costs. Second, even if we assumed they would have used best efforts to cause other royalty owners to reject the Unit Agreement, plaintiffs have not even alleged, much less presented any evidence, that they would, or even could, have succeeded in preventing 80% royalty interest approval. Absent a credible allegation and showing that plaintiffs' opposition to the Unit Agreement would have prevented the harm of which they now complain, the misrepresentation is not actionable.

In sum, even if the transportation cost statement in the brochure is construed to constitute a misrepresentation, we find that the district court's conclusion that plaintiffs suffered pecuniary loss by justifiably relying thereon is clearly erroneous.[12]

III. Breach of Contract

The district court applied the four year period of limitations contained in TEX. Bus. &C0N. C0DE ANN. § 2.725 (a) to plaintiffs' breach of contract claim.[13] Section 2.275(b) provides that the cause of action accrues when the breach occurs. Here, the alleged breach occurred more than 13 years before plaintiffs brought this action. The district court also held that the discovery rule did not apply to this claim and, therefore, it was barred by limitations. Plaintiffs argue that the district court should have applied TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(c), which provides that in certain actions therein described the cause of action does not accrue until "the day the dealings in which the parties were interested together cease."[14]

Plaintiffs do not urge that the district court erred by failing to allow them recovery for the royalties allegedly underpaid during the four years just prior to filing suit, but rather appear to take an "all or nothing" position, namely that under section 16, 004 (c) limitations never ran so long as royalty was being paid. Even aside from the fact that plaintiffs did not urge section 16.004(c) in the district court, it is plain that this position is without merit. Under Texas law, "the statute [of limitations] begins to run on money due as royalty under a written contract when such money is due and payable." Foster V. Atlantic Refining Company, 329 F.2d 485, 490 (5th Cir. 1964) (underpayment of royalty claim). That means that for limitations purposes "claims for unpaid royalty 'accrued' monthly as oil and gas are produced and the agreed royalty is not paid." Harrison V. Bass Enterprises Production Co., 888 S.W. 2d 532, 537 (Tex. App -Corpus Christi 1994; n.w.h.). See also, e.g., Mumble Oil & Refining Co. v. Fanthson, 268 S.W.2d 239, 244 (Tex. Civ. App.—Galveston 1934; writ ref'd) ("The four-year statute of limitations applies insofar as appellees were seeking to recover payments due them under the mineral lease more than four years prior to the filing of their action") -These authorities are necessarily inconsistent with application of section 16.004(c) (formerly Tex. Rev. Civ. Stats. Art. 5527 sec. 3) under the terms of

which limitations commence to run when, but only when, "the dealing in which the parties were interested together cease." We know of no decision by any court that has ever applied section 16.004(c) (Or its said predecessor) to a mineral lessor's action for royalty, and we decline to do so. Indeed, Texas courts have rejected the application of section 16.004 (c) 's predecessor, Tex. Rev. Civ. Stats. Art. 5527 sec. 3, to share of production claims under circumstances arguably much closer to those covered by that statute than the claims here are. See, e.g., Luling oil & Gas Co. V. Humble Oil & Refining Co., 191 S.W.2d 716, 720-21 (Tex. 1S46) (claims by one lessee against another who operated property not governed by art. 5527 sec. 3 which "will only apply . . . to the class or classes of persons clearly coming within its terms, and only in causes of action named in the statute"); Shell oil Company v. State, 442 S.W.2d 457, 459 (Tex. Civ. App.—Houston [14th] 1969; n.r.e.) (lessor's royalty claim can't avoid normal four year statute by calling it "an accounting for profits"). See also Dvorken v. Lone Star Industries, 740 S.W.2d 565, 566 (Tex. App. -Fort Worth 1967; n.w.h.) ("Under Texas law, actions for the recovery of royalty payments. . . are subject to the general tour-year statute of limitations . - Tex. Civ. Pract. & Rem. Code sec. 16.051 (Vernon 1956)") . We decline to hold that section 16.004(c) is applicable.

In any event, it is clear that plaintiffs have no breach of contract claim. As the district court stated in its bench trial ruling, the breach of contract claim "is founded upon the brochure and the testimony." As previously observed, the Unit Agreement expressly and unambiguously provided that it did not change how working interest owners settle for royalty interests and such settlements would be governed by and in accordance with existing contracts, laws and regulations. Because, as the district court found, the gas was marketable before being transported from Colorado to Texas, the royalty interests bear their proportionate share of the cost of that transportation. See note 7 above. The brochure does not purport to either be contractual or to alter the Unit Agreement or the existing contracts which governed royalty settlement, and it is at most representational. Neither.

Ptasynski nor Gray testified that they considered the brochure to be contractual, and, as discussed above (see part II B 2), each testified that they did. not understand it to alter how their royalty would be calculated or enlarge their royalty rights. Moreover, as previously noted, neither was able to testify that had the brochure not contained the challenged statement they would not have approved the Unit Agreement. For the same reasons (see part II B 2) that the record does not support a finding of justifiable reliance by either Ptasynski or Gray on the challenged statement in the brochure, it likewise does not support a finding that that statement created any contractual right, not provided for in the instruments under which they hold their royalty interests, to have their royalty calculated without proportionately bearing the cost of transportation of the marketable gas from Colorado to Texas.[15]

IV. Negligence Per Se

Paragraph 46 of the complaint alleges that, by failing to provide information required by TEX. NAT. RES. CODE § 91.502, defendants committed negligence per se and are liable to plaintiffs therefore.[16] The district court concluded that Texas law provides no private enforcement mechanism for violations of section 91.502. In their briefs to this Court, plaintiffs reassert their section 91.502 argument and contend, for the first time, that defendants' failure to disclose exactly how plaintiffs' royalties were calculated violates COLO. REV. STAT. § 34-60-118.5 (2.3) and defendants' fiduciary duty to plaintiffs.[17]

The complaint does not allege that defendants breached a fiduciary duty to plaintiffs or that defendants violated Cow. Rev. Stat. § 34-60-118.5(2.3). Neither argument appears to have been presented to the district court. Accordingly, this Court cannot consider them. See Diaz v. Collins, 114 F.3d 69, 71 n.5 (5th Cir. 1997) . However, we note the following: 1) Cow. REV. STAT. § 34-60- 118.5 (2.3) was not enacted until July 1, 1998; 2) the Colorado supreme Court has held that there is no private right of action under the Oil

and Gas Conservation Act (see Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 919 (Cola. 1997)); 3) neither Colorado or Texas law recognizes a fiduciary relationship between royalty interest and working interest owners (see HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998) and Garman v. Conoco, Inc., 886 P.2d 652, 659 n.23 (Cob. 1994)); and 4) the Tenth Circuit has suggested that the Colorado Supreme Court would probably, not impose a fiduciary duty upon unit operators (Atlantic Ritchfield v. Farm Credit Bank of Wichita, 226 F. 3d 1138, 1162 n. 12 (10th Cir. 2000)).

At oral argument, plaintiffs opined, for the first time, that Shell owed plaintiffs a fiduciary duty because the unit Agreement constituted a joint venture under Colorado law. Plaintiffs rely heavily upon Dime Box Petroleum Corp. V. Louisiana Land and Exploration Co., 938 F.2d 1144, 1147 (10th Cir. 1991), which found than an operating agreement satisfied Colorado's three-part test for the existence of a joint venture. The elements are; 1) a joint interest in property; 2) an express or implied agreement to share in the losses or profits of the venture; and 3) conduct showing cooperation in the venture. Id. (quoting Agland, Inc. v. Koch Truck Line, Inc., 757 P.2d 1138 (Cob. Ct. App. 1975)). While Shell and the plaintiffs do have a joint interest in the carbon dioxide until Shell sells it, the Unit Agreement does not provide that profits and losses are shared. Whether Shell extracts the carbon dioxide for free or for triple the amount it could be sold tar, 'Shell still owes plaintiffs the same royalty. Profits and losses are not shared.

As to the district court's conclusion that there is no private right of action for violation of Tex. NAT. Res. CODE § 91.502, plaintiffs' only response is a citation to Lively v. Carpet Services, 904 S.W.2c3. 868, 873. (Tex. Ct. App. 1995), which states that the absence of a specific statutory provision authorizing private enforcement is not necessarily fatal to maintenance of an action for negligence per se. Plaintiffs make no attempt to argue that, considering the factors set forth by the Texas Supreme Court in Ferry V. S.N., 973 S.W.2d 301 (Tex. 1996), violation of section 91.502 constitutes

negligence per se. The two most relevant factors are: 1) whether the statute is the sole source of any tort duty from the defendant to the plaintiff or merely supplies the standard of conduct for an existing common law duty; and 2) whether the plaintiff's injury is a direct or indirect result of the violation of the statute. Id. at 309. Both of these factors seem to militate against viewing violation of section 91.S02 as negligence per se. However, as plaintiffs have not even attempted to argue the relevant Texas law on this point, their position can be rejected without further analysis. Moreover, plaintiffs have cited no authority to indicate that section 91.502, is applicable to royalty payments made to nonresidents of Texas on the basis of instruments executed outside of Texas and in respect to mineral production in Colorado.

V. Fraud

The district court in its bench trial findings rejected plaintiffs' claims of fraud and fraudulent concealment, finding that neither was supported by the evidence.[18] Plaintiffs tail to address the district court's finding that no facts were adduced at trial to support their claims in this respect. Plaintiffs do not allege the district court committed any legal errors or argue that its findings of fact were clearly erroneous. No error is presented as to any of these matters.

Conclusion

Even if the district court was correct that the brochure contained a misrepresentation, it is clear that the plaintiffs did not rely thereupon. To the extent that they may have relied on the brochure, such reliance was not justified. And even if such reliance would have been justified, it did not cause the harm of which plaintiffs now complain. As explained, the district court's express and implied findings to the contrary were clearly erroneous. The judgment for plaintiffs on the negligent misrepresentation and declaratory judgment claims is reversed. The plaintiffs' cross-appeal concerning prejudgment interest is moat. Finally, we affirm

the dismissal of all of plaintiffs' remaining claims, including their breach of contract, negligence per se and fraud claims.

AFFIRMED in part, REVERSED in part.

Footnotes

*Pursuant to 5TH CIR. R.47.5S the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1Shell Cortez Pipeline Co., a Shell subsidiary, was a 50% partner in the Cortez Pipeline Co. Mobil Cortez Pipeline Co., a Mobil subsidiary, was a 37% partner.

n2The price of the carbon dioxide under the Denver Unit contract was $. 90 per thousand cubic feet (mcf), but the contract provided this price would fluctuate according to the price of oil. In addition, the contract required the Denver Unit operator to also reimburse Shell for the cost of transporting the carbon dioxide from McElmo Dome to West Texas -

n3Wilfred L. Gray later transferred his interests in the leases to W.L. Gray & Co., a partnership owned by Wilfred L. Gray and his wife. W. L. Gray & Co. is the named plaintiff.

n4The district court correctly observed that, in Texas, fraudulent concealment in this context is not an independent cause of action. Rather it serves to estop a defendant from relying upon the defense of limitations until the plaintiff discovers or could by reasonable diligence have discovered the defendant's fraud. See Computer Associates International v. Altai, 918 S.W. 2d 453, 456 (Tex. 1996) See also Rozell v. Kaye, 197 F.Supp. 733, 735 (S.D. Tex. 1961).

n5Gray has not asserted any claims against Mobil.

n6The tailgate value of the carbon dioxide corresponds to its value at the tailgate of the McElmo Dome

Unit plant, after it has been gathered from the wellhead and processed, but before it has been transported to the buyer. The downstream price reflects the increased value of the delivered carbon dioxide. Assuming the price of transportation is reasonable, the downstream price should be approximately equal to the sum of the tailgate price and the cost of transport.

n7 Not surprisingly, when the Colorado Supreme Court later addressed the issue of cost allocation in Garman v. Conoco, Inc., 886 P.2d 652 (Colo. 1994), it held that working interest owners must bear the entire cost of making the resource marketable but, absent agreement to the contrary, they may share certain value-enhancing costs with the non-working interest, transportation was specifically mentioned as such a value-enhancing cost that may be shared. Id. at 661.

The Colorado Supreme Court's recent decision in Rogers v. Westerman Farm Company, 29 P.3d 887 (Colo. 2001), does not point in a different direction in the present context. There the Colorado Supreme Court stated that "the determination of whether transportation costs (either short or long distance) are to be allocated between the parties is based on whether the gas is marketable before or after the transportation costs are incurred", id. at 900, and "[o]nce a determination is made that gas is marketable, costs can be allocated accordingly. Costs incurred to make the gas marketable are to be borne solely by the lessees. Alternatively, costs incurred subsequent to the gas being marketable are to be shared proportionately between the lessee and the lessors." Id. at 912-13. Here, the district court clearly determined that the gas was marketable before the 500 mile transportation to Texas. In its June 16, 1999 summary judgment opinion the court stated "[t]he parties in this case are not arguing over the costs of making the carbon dioxide gas marketable but over the costs of moving the marketable gas from Colorado to Texas"; and in its oral ruling at the conclusion of the bench trial the court "incorporate[d] the Court's memorandum opinion filed June 16, 1999 in which the cross motions for summary judgment were granted in

part and denied in part. The background facts are as stated in that memorandum opinion." Plaintiffs in this appeal have not challenged the district court's determination that the gas was marketable at the tailgate of the McElmo Dome Unit plant.

n8 We have referred to the "justifiable reliance" requirement as being "also called the 'materiality' element" of a negligent misrepresentation claim. Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521, 526 (5th Cir. 1987). See also McCamish, Martin, Brown & Leoffler v. F. E. Appling, 991 S.W.2d 787, 794 (Tex. 1999.) (negligent misrepresentation claim requires that "a claimant justifiably rely on a . . . representation of material fact")

n9 In Clardy we held there was no evidence to justify trial on a negligent misrepresentation claim, stating:

> "...no reasonable trier of fact would believe that John Clardy, Jr., in fact relied on Norvet's representations regarding the loan approval process. In other words, no reasonable trier of fact would conclude that Clardy Manufacturing . . . would not have entered into the letter agreement if Marine had made explicit the fact that final credit approval had to come from outside of Dallas. Clardy Manufacturing can therefore not show that the representation was "material" to its decision to enter into the agreement." Id. (footnotes omitted).

n10 The $.90 price quoted in the brochure was the price as of December 1981. By the time of the October 1982 hearing, the price had fallen to $.85, and by the time of the first royalty payment it had further decreased to $. 79, all pursuant to the stated formula calling for it to be adjusted in accordance with fluctuations in the price of oil.

n11 See also, e.g., American Tobacco Co. Inc. v. Grinnell, 951 S.W.2d 420, 436 (Tex. 1997) ("negligent misrepresentation claims require reasonable reliance on the

representation"); Faciolla v. Linbeck Const. Corp., 968 S.W.2d 435, 442 (Tex. App.-Texarkana 1998; n.w.h.) .

n12 Accordingly, we need not and do not reach defendants' arguments that; 1) benefit of the bargain damages were inappropriate; 2) the damage award included damages owed not by Shell or Mobil, but by Santa Fe, 3) the declaratory judgment order was impermissibly vague; and 4) Mobil was not responsible for the content of the brochure.

n13 TEX. Bus. & COM. CODE ANN. § 2.725 provides:
§ 2.725. Statute of Limitations in Contracts for Sale
(a) An action for breach of any contract for sale must he commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.
(b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
(c) Where an action commenced within the time limited by subsection (a) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
(d) This section does not alter the law on tolling of the statute of Limitations nor does it apply to causes of action which have accrued before this title becomes effective.

n14 Tex. Civ. Prac. & Rem. Code An. § 16.004 provides:
§ 16.004. Four-Year Limitations Period
(a) A person must bring suit on tile following actions not later than four years after the day the cause of action accrues;

(1) specific performance of a contract for the conveyance of real property;

(2) Penalty or damages on the penal clause of a bond to convey real property;

(3) debt;

(4) fraud;

(5) breach of fiduciary duty.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

n15 With respect to promissory estoppel, even if it were otherwise available, which is highly doubtful since the relevant computation of royalty is governed by the contracts or leases under which plaintiffs hold their royalty interest as expressly and unambiguously provided in the Unit Agreement, it would be inapplicable because (as demonstrated in part II B 2) the record does not support a finding of justifiable reliance by plaintiffs. See Clardy, 88 F.3d at 360-61 (where evidence would not support finding of justifiable reliance, no promissory estoppel recovery available); Allied Vista, Inc. v. Molt, 987 S.W.2d 136, 141-42 (Tex. App. -Houston [14th] 1999; writ denied) (jury verdict for plaintiff on promissory estoppel set aside where "reliance was not reasonable or justified as a matter of law". See also Zenor v. El Paso Healthcare system, Ltd, 176 F. 3d 847, 8G5 (5th Cit. 1999).

n16 TEX. NAT. RES. CODE § 91.502 provides; 91.502. Types of Information Provides.

Each check stub or attachment to a payment form must

include:

(1) the lease, property, or well name or any lease, property, or well identification number used to identify the lease, property, or well; (2) the month and year during which the sales occurred for which payment is being made;

(3) the total number of barrels of oil or the total amount of gas sold; (4) the price per barrel or per MCP of oil or gas sold;

(5) the total amount of state severance and other production taxes paid;

(6) the windfall profit tax paid on the owner's interest; (7) any other deductions or adjustments;

(8) the net value of total sales after deductions;

(9) the owner's interest in sales from the lease, property, or well expressed as a decimal;

(10) the owner's share of the total value of sales before any tax deductions;

(11) the owner's share of the sales value less deductions; and (12) an address at which additional information may be obtained and questions may be answered.

n17 Colo. RSV. STAT. § 34-60-118.5(2.3) provides:

(2.3) Notwithstanding any other applicable terms or arrangements, every payment of proceeds derived from the sale of oil, gas, or associated products shall be accompanied by information that includes, at a minimum:

(a) A name, number, or combination of name and number that identifies the lease, property, unit, or well or wells for which payment is being made;

(b) The mouth and. year during which the sale occurred for which payment is being made;

(c) The total quantity of product sold attributable to such payment, including the units of measurement for the sale of such product;

(d) The price received per unit of measurement, which shall be the price per barrel in the case of oil and the price per thousand cubic feet ("MCF") or per million British therman units ("MMBTU") in the case of gas;

(e) The total amount of severance taxes and any other production taxes or levies applied to the sale;

(f) The Payee's interest in the sale, expressed as a decimal

and calculated to at least the sixth decimal place;
(g) The payee's share of the sale before any deductions or adjustments made by the payor or identified with the payment;
(h) The payee's share of the sale after any deductions or adjustments made by the payor or identified with the payment;
(i) An address and telephone number from which additional information may be obtained and questions answered.

n18 The court found:

> "There has been no evidence during trial that would establish that the defendants were reckless with their choice of language in the brochure or that they intended for the plaintiffs to interpret the brochure language to their detriment in the matter claimed in the fraud count.
> They have also failed to establish the third and fourth elements of the fraud claim, that's made with the intent that the plaintiff would rely on that claim and also made knowing false or recklessly made.
> So I would find for the defendant on the fraud claim."

It also found:
"the Court does specifically find that the plaintiffs failed to introduce any evidence at trial which established either that the defendants knew that they were negligently misrepresenting their method of calculating royalty payments or failing to disclose, as required by Texas law; or, that the secondly, that they use4 deception to conceal either of these torts. Accordingly, the defense of fraudulent concealment does not prevent the running of the applicable Statute of Limitations periods."

CA 3:97-CV-1208-R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HARRY PTASYNSKI and W.L. GRAY & CO.,
Plaintiffs,

vs.

SHELL WESTERN B&P, INC., SHELL OIL COMPANY
and MOBIL OIL CORPORATION,
Defendants,

June 15, 1999, Decided

June 16, 1999, Filed; June 16, 1999, Entered on Docket

COUNSEL:
For HARRY PTASYNSKI, WL GRAY & CO, plaintiffs: Robert Bryan Perry, Attorney at Law, Law Office of Robert B Perry, Dallas, TX USA.

For SHELL WESTERN E & P INC, SHELL OIL COMPANY, MOBIL OIL CORP, defendants: Paul I Aronowitz, Attorney at Law, Shook Hardy & Bacon, Houston, TX USA.

LOUIS J WEBER, JR, ADR Provider, Pro se, Dallas, TX USA.

JUDGES:
JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY:
JERRY BUCHMEYER

OPINION:

MEMORANDUM OPINION AND ORDER

Now before the Court is Plaintiffs' Motion for Partial Summary Judgment filed with this Court on October 23, 1998 and Defendants' Motion for Summary Judgment filed on November 9, 1998. For the reasons stated below, these cross-motions for summary judgment are GRANTED in part and DENIED in part.

I. BACKGROUND FACTS

This oil and gas dispute centers on the method used by Defendants Shell and Mobil to calculate the royalty payments paid to Plaintiffs Harry Ptasynski and W.L. Gray & Co., overriding royalty interest owners in lands operated by Defendants for the purpose of extracting carbon dioxide. The lands at issue are located in Montezuma and Dolores Counties, Colorado in an area known as the McElmo Dome Unit, which covers just over 200,000 acres. Carbon dioxide taken from the unit is shipped by pipeline to oil fields in West Texas where it is used to enhance oil recovery.

On October 6, 1982, Defendants Shell and Mobil, who owned 87% of the working interests in the McElmo Dome Unit, entered into a unitization agreement to more efficiently collect carbon dioxide. Pursuant to the unitization agreement, wells would be drilled in the central portion of the field, in relatively widely spaced clusters of up to four, closely spaced, individual wells. However, before the Colorado Oil and Gas Conservation Commission would approve the unitization project, it required the written consent of 80% of the royalty interest owners. To obtain the required percentage approval, Defendants sent each of the overriding royalty interest owners a solicitation letter accompanied by a Ratification form, a copy of the Unit Agreement, and a color brochure entitled "McElmo Dome Carbon dioxide recovery project: A program for unit operations." The brochure describes the emerging market for carbon dioxide and explains how unitization works. Three pages of the brochure are devoted to answering specific

questions, including the following questions found on pages 6 and 8:

Who will pay for installing and operating this program?

All installation and operating costs will be paid by the working interest owners. There will be no charges to the royalty owners. ...

Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of CO[2] in West Texas?

No.

The solicitation letter is dated January 6, 1983 and closes with the following request: "Due to the critical timing of this project, we would appreciate receiving your signed Ratification by February 15, 1983." See J. App. to Def.'s M. for Summ. Judg. at Ex. 6. On or around January 19, 1983, Plaintiffs Ptasynski and Gray signed and returned their respective ratification forms, thereby consenting to formation of the unit. Plaintiffs now claim that they signed up for the unitization project because of the information provided in the brochure, specifically the information regarding transportation costs.

The unitization agreement was finalized in April of 1983 with Defendant Shell as the operator. Production of carbon dioxide from the McElmo Dome Unit began in December of 1983, and Shell and Mobil began issuing checks and statements for production of carbon dioxide in 1984. From 1984 to the present day, Plaintiffs have received monthly royalty payments based on their overriding royalty interests in the Colorado lands.

Plaintiff Ptasynski is an independent geologist with almost fifty years of experience in the oil and gas industry. He first acquired leases in the McElmo Dome area in the sixties and early seventies from the federal government, and later assigned these leases retaining an overriding royalty interest.

Plaintiff W.L. Gray & Co. ("Gray") is a partnership consisting of Wilfred L. Gray and his wife. Like Ptasynski, Gray is an independent geologist with approximately forty years experience in the oil and gas business. Gray first purchased leases in the McElmo Dome area in the sixties and seventies from both the federal government and the State of Colorado. He also assigned his lease interests to others, retaining only an overriding royalty interest.

The parties to this case agree that the federal lease assignments governing Plaintiffs' interests in the McElmo Dome area are silent as to the allocation of development and transportation costs and that the Colorado lease assignment states only that the overriding royalty is assigned "free and clear of all cost and expense of development and operation, in the amount of 3% of 8/8 of all oil, gas, casinghead gas, and other hydrocarbon substances produced, saved and marketed from the following described land." See J. App. to Def.'s M. for Summ. Judg. at Ex. 4. The parties also agree that the Ratification form is silent as to transportation costs and simply states that the undersigned agrees to be bound by the terms and provisions of the 1982 Unit Agreement. In addition, the parties agree that the Unit Agreement expressly provides that royalty payments are to be made by working interest owners "under existing contracts, laws and regulations," and that nothing in the agreement relieves the lessees of their obligations under existing lease agreements. See J. App. to Def.'s M. for Summ. Judg. at Ex. 9.

From 1984 until the present, Plaintiffs have received monthly royalty payments from Defendants. It is undisputed that over this entire period Defendants have used the "tailgate" value of the carbon dioxide to determine the amount of royalties paid out. Since there is no market for carbon dioxide in Colorado, Defendants have calculated tailgate value by taking the market price of the carbon dioxide in West Texas and subtracting the cost of transporting the gas from Colorado to West Texas. At a December 14, 1983 meeting between Defendants, the State of Colorado, the Bureau of Land Management, and the Minerals Management Service, Bill Riddoch from Shell explained that royalty payments "should be based upon the contract price

excluding any tariff charged by the pipeline for transporting the CO[2]." In addition, for each year from 1984 to 1996, Defendants have filed 1099 Forms with the IRS declaring the amount of royalties paid over the course of the year. It is undisputed that the amounts declared on these information returns accurately represent the total amount of royalties paid to Plaintiffs and the other overriding royalty interest owners. It is also undisputed that neither the monthly royalty checks nor the yearly information returns indicate the method used by Defendants to calculate royalties, namely the deduction of transportation costs from the final market value. Indeed, Plaintiffs claim that they did not become aware that Defendants were using the tailgate method until they learned about a lawsuit filed by George O. Bailey and Bridwell Oil Company. That lawsuit was filed in this Court on March 11, 1997 and was dismissed on summary judgment and for lack of subject matter jurisdiction on April 14, 1998. See Bailey v. Shell Western, 1998 U.S. Dist. LEXIS 5446, No. CA-3-97-CV-0518-R, 1998 WL 185520, *1-3 (N.D. Tex. April 14, 1998), aff'd, No. 98-10746 (5th Cir. Jan. 27, 1999).

Plaintiffs Ptasynski and Gray filed suit in federal court on May 21, 1997. Their suit is virtually identical to that filed by Bailey and Bridwell Oil Company, except that in this case the Court also has jurisdiction based on diversity. While Bailey and Bridwell Oil Company are Texas residents, Ptasynski and Gray reside in Wyoming and Colorado respectively. Plaintiffs Ptasynski and Gray claim that they should not be charged the costs of transporting the carbon dioxide to its final market in West Texas and should instead receive royalties based on the gross proceeds of the sales. Defendants respond that they are not charging Plaintiffs for transportation costs but simply calculating royalties based on the price after gathering, compressing and dehydration of the carbon dioxide but before transportation to a distant market, what is commonly referred to as the tailgate method. Plaintiffs allege fraud, fraudulent concealment, negligent misrepresentation, civil conspiracy, breach of duty of good faith and fair dealing, breach of contract, and negligence per se. They also contend that Defendants have wilfully filed fraudulent tax information returns, in violation of 26 U.S.C. § 7434. Plaintiffs seek

declaratory relief and monetary damages, including damages for unpaid royalties in the amount of $ 464,725.72 against Shell and $ 89,821 against Mobil, and unspecified punitive damages.

II. ANALYSIS

The parties have each filed a motion for summary judgment. Defendants move for summary judgment on Plaintiffs' claims based on contract, fraud and negligent misrepresentation, tax fraud, negligence per se, fraudulent concealment and civil conspiracy. Plaintiffs move for partial summary judgment with regard to their claims for breach of contract, fraud and fraudulent concealment, negligence per se, entitlement to declaratory judgment, and entitlement to prejudgment interest and attorneys' fees.

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only when there is no genuine issue as to any material fact and the party moving for summary judgment is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986); Melton v. Teachers Ins. & Annuity Assoc. of Am., 114 F.3d 557, 559 (5th Cir. 1997). As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion must be denied. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986). However, summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552, 91 L. Ed. 2d at 273.

B. The Applicable Law

The parties agree that Colorado law applies to Plaintiffs' contract-based claims, and Texas law applies to Plaintiffs' remaining state claims. See Def.'s Response to Pl.'s Motion at 8.

C. Plaintiffs' Breach of Contract Claims

Plaintiffs' breach of contract claims are based on two alleged contracts: their federal and state lease assignments and the brochure. The parties agree that Colorado state law governs Plaintiffs' claims for breach of contract, but disagree in their interpretation of Colorado law.

1. Whether Colorado law allows the Defendants to reduce Plaintiffs' overriding royalties by the Defendants' transportation charges?

Plaintiffs argue that Colorado law forbids Defendants from deducting transportation costs from Plaintiffs' overriding royalty payments, relying on the Colorado Supreme Court's opinion in Garman v. Conoco, Inc., 886 P.2d 652 (Colo. 1994, en banc). In Garman, the Supreme Court answered a question certified to them by the United States District Court for the District of Colorado: "under Colorado law, is the owner of an overriding royalty interest in gas production required to bear a proportionate share of post-production costs, such as processing, transportation, and compression, when the assignment creating the overriding royalty interest is silent as to how post-production costs are to be borne?" Id. at 653. The Supreme Court held that overriding royalty interest owners did not have to pay for such costs. The Court based its holding on Colorado's implied covenant to market which "obligates the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market." Garman at 659, n. 21 (citing Davis v. Cramer, 808 P.2d 358, 361 (Colo. 1991)). However, the Supreme Court was careful to limit its holding to those "post-production" costs expended in the process of making the product suitable for market. The Court distinguished this type of post-production cost from post-production costs involved in enhancing the value of the marketable product, which are shared between the parties. See 886 P.2d at 661 (upon obtaining a marketable product, any additional costs incurred to enhance the value of the marketable gas, such as those costs conceded by the Garmans, may be charged against nonworking interest owners); id. at 655 ("the Garmans concede that costs incurred after the gas is made

marketable, which actually enhance the value of the gas, should be borne proportionately by all parties benefitted by the operations ... the transportation costs associated with moving marketable gas from the tailgate of the processing plant where the gas enters the interstate pipeline to the point of sale are properly deductible ... the costs incurred to process raw gas into its component parts after a marketable product has been obtained are generally deductible to the extent they are reasonable, provided such operations actually enhance the value of the product.") In its first footnote, the Court noted that "traditionally, the costs to transport gas to a distant market are shared by all benefitted parties," that is by both the working and the non-working interest owners. See id. at 653, n. 1 (emphasis added). Finally, the Garman Court held that whether certain expenses are incurred to make a product marketable or to enhance its value is a question of fact. See id. at 654, n. 3.

The transportation costs at issue in the present dispute are the costs of transporting the carbon dioxide gas from the processing plant in Colorado through the 500 mile pipeline to the market in West Texas. Based on the rule in Garman, it is clear that these transportation costs are the type of post-production costs which can be shared with overriding royalty interest owners. The parties in this case are not arguing over the costs of making the carbon dioxide gas marketable but over the costs of moving the marketable gas from Colorado to Texas. As expressly stated by the Court in Garman: "the transportation costs associated with moving marketable gas from the tailgate of the processing plant where the gas enters the interstate pipeline to the point of sale are properly deductible." See Garman, at 655.

2. Whether any of the contracts between the parties prevents Defendants from deducting transportation costs?

In Garman, the Supreme Court found that the leases at issue were silent with regard to distribution of post-production costs but held that parties are free to contract around the law governing post-production costs. See Garman at 657; see also, Magnetic Copy Serv. v. Seismic Specialists, Inc., 805 P.2d 1161, 1163 (Colo. App. 1990). The parties here

agree that the federal and state lease assignments at issue in this case are silent. The federal lease assignments say nothing about the distribution of post-production costs, and the Colorado lease assignment only states that overriding royalty interests are free and clear of production and operation costs. In addition, the 1982 Unit Agreement simply provides that royalty payments are to be made as specified in the underlying contracts, in this case the federal and state lease assignments. Thus far, it appears that the parties did not contract around the default rule set forth by the Supreme Court in Garman.

However, Plaintiffs point to the eight-page colored brochure describing the unitization project and the costs to the non-working interest owners. Page eight of the brochure contains the following question and answer:

Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of CO[2] in West Texas?
No.

Plaintiffs claim to have interpreted this language as a departure from the standard tailgate method whereby royalty owners are responsible for sharing transportation costs. Defendants disagree on several grounds. They first argue that the brochure is not a contract and is incapable of altering the default law. Defendants claim that since the Unit Agreement which was sent with the brochure says to look to the assignment to calculate royalties, the brochure is not part of any contract. Defendants also argue that since the brochure postdates the assignments by several years it cannot affect the royalty provision of the assignments.

This Court finds that genuine issues of material fact remain regarding interpretation of the language in the brochure. In contract interpretation, courts are to put themselves in the position of the parties to the contract. See Travelers Indemnity Company v. Holman, 330 F.2d 142 (5th Cir. 1964). Specifically, the reasonableness of Plaintiffs' stated belief that the brochure offered contract terms which

varied from the typical industry method of calculating royalty payments is not something that can be decided on summary judgment. For this reason, the parties' cross-motions for summary judgment on Plaintiffs' contract law claims are DENIED.

D. Plaintiffs' Fraud and Negligent Misrepresentation Claims

Plaintiffs also allege that Defendants drafted the question and answer in the brochure explaining that non-working interest owners would not be charged for transportation costs to trick Plaintiffs into ratifying the unit agreement and that this action constitutes fraud and negligent misrepresentation. Under Texas law, the elements of an actionable tort of fraud are: (1) that a material representation was made; (2) that it was false; (3) that when the speaker made it he knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; (5) that he thereby suffered injury. See Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977). Defendants first argue that their statements in the brochure were true, since Plaintiffs were not charged for transportation costs but simply received royalty payments based on total costs minus transportation costs. The Court finds this argument to be pure semantics. Defendants next argue that Plaintiffs cannot establish detrimental reliance as there were no wells drilled on their specific portion of the McElmo Dome lands. The Court believes this argument to be a red herring as the whole point of the unitization project was to maximize efficiency by drilling wells in widely-spaced clusters. Finally, Defendants argue that any statements in the brochure were not material to either Plaintiff as each believed the underlying assignments already entitled them to be paid royalties based on the delivered gross sales price without any deduction for transportation costs. However, after reviewing all of the materials contained in the summary judgment evidence, the Court concludes that the Plaintiffs' understanding of the assignments and subsequent reliance on the brochure presents fact questions which cannot be resolved on

summary judgment. Accordingly, the parties' cross-motions for summary judgment on Plaintiffs' fraud and negligent misrepresentation claims are also DENIED.

E. Plaintiffs' Tax Claim

Plaintiffs assert that Defendants willfully filed fraudulent tax information returns and thus violated 26 U.S.C. § 7434, which states that "if any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return." The returns alleged to be fraudulent in this case are Defendants' 1099 Forms for the years 1984 through 1996. These forms were filed pursuant to 26 U.S.C. 6050N, which provides: "Every person ... who makes payments of royalties ... shall make a return according to the regulations prescribed by the Secretary, setting forth the aggregate amount of such payments and the name and address of the person to whom paid."

As pointed out by Defendants in their Motion for Summary Judgment, this Court has already decided this question in a case involving virtually identical facts and claims. In Bailey v. Shell Western, this Court dismissed Bailey's federal claims finding that the tax returns at issue were not in violation of federal law because they accurately represented the royalties actually paid to the Plaintiffs. See Bailey v. Shell Western, 1998 U.S. Dist. LEXIS 5446, No. 3-97-CV-0518-R, 1998 WL 185520, at *1-3 (N.D. Tex. 1998), aff'd, No. 98-10746 (5th Cir. Jan. 27, 1999). As in Bailey, Plaintiffs Ptasynski and Gray admit that the amounts reported on Defendants tax returns are the amounts actually paid them in royalties, less taxes. Accordingly, consistent with its opinion in Bailey, this Court again concludes that the tax returns themselves contain no misrepresentations and GRANTS Defendants summary judgment on this issue.

F. Plaintiffs' Negligence Per Se Claim

Plaintiffs assert negligence per se claims under the Texas Natural Resources Code, which requires that royalty payments made with regard to oil and gas leases be

accompanied by certain, specified information, including "any other deductions or adjustments." TEX. NAT. RES. CODE ANN. § 91.502. Defendants argue that they should be granted summary judgment on this claim because the Texas statute only regulates payments relating to oil and gas produced in Texas. Defendants provide no authority for this conclusion and the statue itself describes payments "made to a royalty interest owner from the proceeds derived from the sale of oil or gas production pursuant to a division order, lease, servitude, or other agreement," which arguably covers oil and gas sold in Texas. See id. Defendants also argue, in the alternative, that carbon dioxide is not covered under the statute and that Plaintiffs' negligence per se claim fails to allege proximate cause or damages. The Court finds that questions of fact remain on both of these arguments and DENIES Defendants' Motion for Summary Judgment on this claim.

G. Plaintiffs' Fraudulent Concealment Claim

Plaintiffs have also alleged a claim for fraudulent concealment. In response, Defendants argue that Texas law does not recognize fraudulent concealment as a substantive cause of action, but only as a defense capable of tolling the running of the statute of limitations. See Rozell v. Kaye, 197 F. Supp. 733, 735 (5th Cir. 1961) ("fraudulent concealment does not constitute a new and separate cause of action in itself. It merely estops the guilty party from asserting or relying upon the defense of limitation until his fraud was, or could, by the exercise of ordinary diligence, have been discovered by the plaintiff."). As discussed in Section I below, Plaintiffs' fraudulent concealment argument is recognized as a defense to the limitations argument but not as an independent, substantive cause of action. Accordingly, Defendants' Motion for Summary Judgment is GRANTED with regard to Plaintiffs' fraudulent concealment claim.

H. Plaintiffs' Civil Conspiracy Claim

Defendants move for summary judgment on Plaintiffs' civil conspiracy claim. A civil conspiracy under Texas law requires proof of (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the course of

action or object; (4) one or more unlawful, overt acts; and (5) damages. See Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983); Central Sav. and Loan Ass'n v. Stemmons Northwest Bank, 848 S.W.2d 232, 241 (Tex. App. – Dallas 1992, no writ). Defendants argue that Plaintiffs' claim fails as a matter of law because they cannot establish an unlawful act, the fourth required element. This Court again finds that fact questions exist preventing summary resolution of this claim.

I. Defendants' Affirmative Defense of Statute of Limitations

In their Answers to Plaintiffs' First Amended Complaint, Defendants assert the affirmative defense of limitations, and Defendants now move for summary judgment on the grounds that each of Plaintiffs' state claims are barred under the applicable Texas statutes of limitations. In cases involving a conflict of laws, a court may apply the law of the forum state on procedural matters even when it is applying another state's substantive law. See e.g., Crase v. Astroworld, Inc., 941 F.2d 265, 266 (5th Cir. 1991) (recognizing that Louisiana's choice of law rules view statutes of limitations as procedural). Under Texas law, the statute of limitations for breach of contract and fraud claims is four years, while the period for negligence claims is two years. See TEX. CIV. PRAC. & REM. CODE ANN. § § 16.003, 16.004 (West 1986); see also, Kansa Reinsurance v. Congressional Mortg. Corp., 20 F.3d 1362 (5th Cir. 1994). Texas law provides that a cause of action for fraud accrues either when the fraud is discovered or when the facts giving rise to the fraud claim are discovered or might reasonably be discovered through reasonable diligence. See id. at 1369. Defendants argue that since they have been using the tailgate method to calculate Plaintiffs' royalty payments since the monthly payments began in 1984, Plaintiffs' state law claims are barred because they were not filed until 1997, some fourteen years after the alleged injury. However, the heart of Plaintiffs' claim is that they were misled about the method used to calculate royalty payments and that they did not learn that they were being charged for transportation costs until March of 1997 when the Bailey suit was filed.

Plaintiffs argue that Defendants are estopped from their limitations argument because they fraudulently concealed the method of payment used. See Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex. 1983); DiGrazia v. Old, 900 S.W.2d 499 (Tex.App. – Texarkana 1995) ("fraud vitiates whatever it touches, and a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations."). Consistent with earlier findings in this opinion, the Court finds that fact issues exist preventing summary resolution of Plaintiff's allegation of fraudulent concealment and accordingly DENIES Defendants' Motion for Summary Judgment with regard to their argument that the limitations period has been exceeded.

III. CONCLUSION

For the foregoing reasons, this Court DENIES the cross-motions for summary judgment with regard to Plaintiffs' contract and fraud claims; DENIES Defendants' Motion for Summary Judgment with regard to Plaintiffs' civil conspiracy and negligence per se claims; DENIES Defendant's Motion for Summary Judgment with regard to its limitations defense; and GRANTS Defendants' Motion for Summary Judgment with regard to Plaintiffs' tax claim and substantive claim of fraudulent concealment. At the end, Plaintiffs' claim that Defendants willfully filed fraudulent tax information returns is DISMISSED with prejudice, as is their claim for fraudulent concealment. The remainder of Plaintiffs' state law claims, namely their breach of contract, civil conspiracy, negligence per se, and fraud claims, survive for trial.

It is so ORDERED.

Signed this 15 day of June, 1999.

CHIEF JUDGE JERRY BUCHMEYER

UNITED STATES DISTRICT COURT

No. 99-11049

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HARRY PTASYNSKI and W.L. GRAY & CO.,
Plaintiffs-Appellees-Cross-Appellants,

vs.

SHELL WESTERN B&P, INC., ET AL
Defendants,

SHELL WESTERN B&P, INC., SHELL OIL COMPANY,
and MOBIL OIL CORPORATION,
Defendants-Appellants-Cross-Appellees.

Filed May 24, 2002

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 2/13/02)

Before GARWOOD, PARKER, and DENNIS, Circuit Judges.

PER CURIAM;*

In their petition for rehearing plaintiffs urge, among other things, that their contract claims are not barred by limitations, and that they have viable contract claims because the district court, in its June 16, 1999 order, observed that "there is no market for carbon dioxide in Colorado," and accordingly, plaintiffs contend, under the instruments creating their overriding royalty interests (their lease assignments) they could not be required to bear any portion of the cost of transporting the carbon dioxide over the some 500 miles from the tailgate of the McElmo Dome Unit to West Texas.

As the district court in its June 16, 1999 order noted "Plaintiffs' breach of contract claims are based on two alleged

contracts: their federal and state lease assignments and the brochure." In that order the court held that plaintiffs as a matter of law had no right to any contract recovery on the basis of their federal and state lease assignments, and that there was a fact issue for trial as to whether they had a contractual claim on the basis of the brochure. Accordingly, the only contract claim which was bench tried was that based on the brochure itself. Only the claims which were bench tried were before us. Plaintiffs in their cross-appeal brief and in their reply brief in this Court never urged as error any claim that the district court erred in its June 16, 1999 ruling that their contract claims based on their lease assignments were invalid. Accordingly, any contract claim based on the underlying leases and the assignments thereof is not before us. As to plaintiffs only other contract claims, those based on the brochure, the brochure did not, as a matter of law, constitute or create a contract (see the last grammatical paragraph of part III of our February 13, 2002 opinion herein).

Plaintiffs also point out that our opinion incorrectly states that before the brochure was sent out Shell "had only to obtain consent of an additional 4% of the total royalty interest in order to secure final approval [of the unit] from the [Colorado] Commission." Our error in this respect is immaterial. Shell was required to have approval of more than 80% of the cost free interests and this would have required it to procure approval of the owners of approximately one fifth of the overriding royalty interests (collectively, the overriding royalty interests owned approximately 25% of the total cost free interests); Shell already had approval for approximately 76% of the cost free interests. However, there is no evidenee (or claim) that plaintiffs together owned (or controlled) a sufficient overriding royalty interest to have prevented Shell from procuring the required 80% of the cost
free interests if plaintiffs had not approved the unit. Shell eventually procured approval of 92.5% of the cost free interests. There is no evidence that this percentage would have been less than 80.5% if both plaintiffs had withheld approval.

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.**

No further petition for rehearing will be entertained. The mandate shall issue forthwith.

Footnotes

*Pursuant to 5TH CIR. R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

**Judge Edith H. Jones did not participate in the consideration of the rehearing en banc.

to them from day one because as soon as they got the unit ratified they started deducting transportation and deliberately and willfully concealed it by issuing statements that said were paying you the gross value.

Your Honor, the record shows they did not pay the royalty on the contract prices. The 1984 Amoco contract showed a contract price of $1.03 and they deducted the 39 cent Cortez pipeline for, transportation to West Texas to get their net royalty price.

Your Honor, that is fraud. And Mr. Ptasynski and Mr. Gray are entitled to their damages, including prejudgment interest, their attorneys' fees and punitive damages should be assessed against Shell and Mobil for their willful and fraudulent behavior.

Thank you. Your Honor.

THE COURT: Thank you, Mr. Perry.

I did read the entire deposition of Deborah Sue Hartsfield and Mark R. Burroughs that were tendered to me. Those will be filed as Court's Exhibits A and B so they will be in the record for appeal purposes.

There was no joint pretrial order that was submitted. There were individual pretrial orders proposed by the plaintiff and by the defendant. Those will be filed simply to show that those things were presented to the court before trial. We tried the Case based on the pleadings, not on a pretrial order.

And, obviously in the remarks that I'm going to make, which, will be the Court's decision in the case. I will also incorporate the Court's memorandum opinion filed June 16, 1999 in which the cross motions for summary judgment were granted in part and denied in part. The background facts are as stated in that memorandum opinion.

With respect to the credibility of the witnesses, I do credit the testimony of the two plaintiffs. I also credit the testimony of the defense witnesses, who testified, insofar as they're not inconsistent with the findings that I'm going to make.

As indicated in the memorandum opinion on the motions for summary judgment, there is a serious Statute of Limitations problem which involved both the discovery rule and claim for fraudulent concealment. With regard to the substantive claims by the plaintiff, there is a breach of contract claim, fraud claim, negligence per se claim, civil conspiracy claim and a negligent misrepresentation claim.

I am going to find for the plaintiffs on the negligent misrepresentation claim and I will explain why in these comments.

With respect to the other claims, I will find in favor of the defendant on the breach of contract, fraud, negligence per se and civil conspiracy.

Now, with reference to the Statute of Limitations defense, under Texas law federal courts in diversity cases like this must apply the Texas Statute of Limitations. The Texas law provides a four-year Statute of Limitations period for contract claims and for fraud claims. It provides a two-year Statute of Limitation period for negligent misrepresentation, negligence per se and civil conspiracy.

With reference to the discovery rule, under the discovery rule, for certain causes of action the applicable statute of limitations period does not begin to run until the plaintiff knows or should reasonably know about the alleged breach of contract or the alleged fraud.

With regard to the breach of contract claims alleged by the plaintiffs, the Texas Uniform Commercial Code explicitly provides that a cause of action accrues when the breach occurs regardless of the aggrieved parties lack of knowledge of the breach. That's section 2.725(b) of the Texas Business

and Commerce Code. Accordingly, the plaintiffs' breach of contract claim, which, of course, is founded upon the brochure and the testimony, cannot be saved by the discovery rule. However, the negligent misrepresentation claim certainly fits within discovery rule. Accordingly, the plaintiffs are not subject to the two-year Statute of Limitations period until they discovered or reasonably should have discovered that the transportation costs were being deducted from their royalty payments.

Plaintiffs, under the evidence in this case and credibility determinations that I make, the plaintiffs certainly did not learn the transportation costs were being deducted until they learned about a lawsuit that was filed by Mr. George Bailey and Bridwell Oil Company on March 11, 1997. That was the discovery point. Plaintiffs filed their lawsuit only 10 days later on May 21 - I'm sorry, that may be wrong. It's either March 11 or May 11. And then the second date, when they filed their lawsuit, was May 21 or March 21. But there was only 10 days difference from the time the plaintiffs learned of the Bailey-Bridwell Oil Company suit until they brought claims in this court. So the Court concludes that the plaintiffs' claim for negligent misrepresentation is not time barred.

Plaintiff also alleges fraudulent concealment and argues that the Statute of Limitations should be tolled because the deduction of transportation charges were fraudulently concealed. The Texas law requires that plaintiffs, in order to prevail on a fraudulent concealment claim, to prove first the existence of the underlying tort; second, the defendant's knowledge of that tort; third, the defendant's use of deception to conceal the tort; and fourth, the plaintiffs reasonable reliance on the deception. To establish a fraudulent concealment the plaintiff must show that the defendant had a duty to disclose certain information and failed to do it.

Under the evidence in the case, the only possible duty to disclose would have arisen under the Texas Natural Resource Code. However, the Court does specifically find that the

plaintiffs failed to introduce any evidence at trial which established either that the defendants knew that they were negligently misrepresenting their method of calculating royalty payments or failing to disclose, as required by Texas law; or, that the - - secondly, that they used deception to conceal either of these torts. Accordingly, the defense of fraudulent concealment does not prevent the running of the applicable Statute of Limitations periods.

Now, with regard to the specific causes of action, addressing those in turn, first breach of contract claims. The plaintiffs, of course, claim that the question and answer provided in the brochure that's been referred to during trial as the lawsuit brochure, they claim that constituted the terms of a contract that were subsequently breached when defendants deducted transportation cost before the calculation of the royalty payments.

The defendants argue that the plaintiffs have misinterpreted the language in the brochure and that the brochure is incapable of altering the method of calculating royalty payments set forth in the underlying lease assignments and the other documents. That need not be addressed because, as I've just indicated, the plaintiffs' breach of contract claim is barred under the Texas four-year statute of limitations period.

Secondly, as to the fraud claim, and here the cause of fraud under Texas law requires these elements: One, that a material misrepresentation was made; second, that it was false; third, that when the speaker made that representation the speaker knew that it was false or made it recklessly without any knowledge of the truth and as a positive assertion: fourth, that the statement was made with the intention that it should be acted on by the plaintiffs; fifth, that the plaintiffs acted in reliance upon it; and finally, that the plaintiffs accordingly suffered injury.

There has been no evidence during trial that would establish that the defendants were reckless with their choice of

language in the brochure or that they intended for the plaintiffs to interpret the brochure language to their detriment in the matter claimed in the fraud count.

They have also failed to establish the third and fourth elements of the fraud claim, that's made with the intent that the plaintiff would rely on that claim and also made knowing false or recklessly made.

So I would find for the defendant on the fraud claim.

As to the negligence per se claims, this is based on the requirement in the Texas Natural Resource Code that royalty payments made on oil and gas leases be accompanied by certain specified information, including, quote, any other deductions or adjustments. That's Section 91.502 of the Texas Natural Resource Code.

During trial the defendants argued that this claim should be denied for at least three reasons. First, that carbon dioxide is not covered by this provision because it's neither oil or gas; second, that the Texas statute does not regulate payments relating to oil and gas produced in Colorado; and third, that the statute includes no private enforcement mechanism.

The court agrees with the defendants' third point as to no private enforcement mechanism and would deny the claim on that ground and would not address the first two points.

The civil conspiracy claim under Texas law requires proof that two or more persons with an object to be accomplished had a meeting of the minds on the course of action or object, one or more unlawful overt acts and then damages. The plaintiff has not established under the evidence that there was an agreement between Shell and Mobil to defraud or misrepresent information to the plaintiffs. Accordingly, I would find for the defendants on the civil conspiracy claim.

However, with reference — - with regard to the negligent misrepresentation claim, here the plaintiffs' argument is that

the use of the question and answer relating to transportation cost in the lawsuit brochure constituted negligent misrepresentation. Indeed, it is obvious from the evidence that this case would not have been filed had it not been for the statement in the brochure. "Question; Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of C02 in West Texas?" And the answer is, "No." I think that's a very clear statement. I reject the argument by the defendants that it means something else than what it said. It said that transportation cost would not have to be paid by the royalty owners.

Under the Texas law negligent misrepresentation requires these elements: First, that the representation was made by a defendant in the course of his business or in a transaction in which he had a pecuniary interest; second, that the defendant supplied false information regarding an existing fact for the guidance of Others in their business; third, that the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and fourth, that the plaintiff suffered actual loss by justifiably relying upon the negligent representation.

Plaintiffs have established each of these elements by a preponderance of the evidence.

Before the Colorado Oil and Gas commission would approve the unitization project, it required the written consent of 80 percent of the royalty interest owners. To obtain that required 80 percent, the defendants sent each of the overriding royalty interest owners a solicitation letter accompanied by the ratification form, accompanied by copy of the unitization agreement and accompanied by the color brochure entitled "McElmo Dome Carbon Dioxide Recovery Project - A program for Unit Operations." The solicitation letter directed readers to look at the brochure for any specific questions they may have. And the brochure, of course, contained the question and answer that I previously stated, which was, "Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of

CO2 in West Texas?" with answer being "No."

However, it's clear from the evidence that the defendant did deduct transportation costs prior to calculating royalty interest payments in effect requiring the plaintiffs to pay for the transportation cost.

One defense witness, Timothy Bradley claimed that the use of the word transportation in the brochure referred only to construction and operation of the 500-mile pipeline itself and not the transportation through the pipeline. I discredit that testimony. its obvious that that is not a correct construction of a very simple sentence.

Similarly, the defense witness, Buster Goode, testified that the brochure meant that the plaintiffs would not have to pay for the pipeline itself. Again, I discredit that testimony. It's simply not consistent with the plain meaning of the language that the plaintiff relied upon.

The defendants' expert witness, Ronnie Platt, testified that transportation did not refer to the Cortez pipeline at all, the brochure and package only concerned the unitization project in Colorado. Similarly, the Court rejects that testimony because it is not credible

The final element the plaintiffs have also established, they relied upon the information in the brochure in deciding to ratify the unitization project and suffered lost royalties as a result. The testimony of both plaintiffs was that they read that information and they relied on it. And I credit the testimony of both of the plaintiffs.

It is true, as established by cross-examination of the plaintiffs by the defense attorneys, that neither of the plaintiffs believed that the brochure changed the method by which royalty payments were typically calculated. However, both of the plaintiffs understood the brochure to mean that they would be paid royalties based on the price at the Denver Unit, that this is the final sales price of the carbon dioxide. Indeed,

Mr. Gray testified that he based his decision to sign the ratification form on calculations he made assuming that the transportation cost would not be deducted from the final sales price. Accordingly, the plaintiffs have successfully established their claim of negligent misrepresentation.

With regard to the defendants' reliance on Federal Land Bank Association of Tyler vs. Sloan and the argument that that restricts the plaintiff to recovery of out-of-pocket damages and that they may not recover what was wrongly deducted from their royalty payment, I disagree with the interpretation placed on that case by the defendants. Indeed, in Sloan the Texas Supreme Court relies upon the restatement which provides; one, the damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is legal cause, including: A, the difference between the value of what he has received in the transaction and his purchase price or other value given for it; and B, pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

Here the plaintiffs are entitled to recover compensatory damages equal to the difference between the royalty payment they would have been paid had payments been calculated based on the final sales price at the Denver Unit and the royalty payment they received, based on the net-back tailgate method. Damages are to be calculated for the entire period of the unitization agreement beginning with the monthly royalty payments made in 1984.

Now, with regard to the specific amounts, I am going to ask the plaintiff to present me with a judgment. I have - - I followed the figures that you gave me in argument, when I asked, but I was working with the proposal for your – plaintiffs" proposal for joint pretrial order. And in your proposed paragraph 19 the transportation charges shown with reference to Shell with Mr. Ptasynski, the figure is $188,708.85, and with reference to Mr. Gray, $303,207.51. And then with reference to Mr. Ptasynski's claim against Mobil, in

paragraph 20, the figure is $118,409.

MR. PERRY: Your Honor, that is correct for Mr. Ptasynski. But the of proposed Findings of Fact and Conclusions of Law add the 1998 numbers for Shell and that was not - -

THE COURT: That's for Mr. Gray?

MR. PERRY: For both Mr. Gray and Mr. Ptasynski.

THE COURT: Okay.

MR. PERRY: Those totals are in the proposed Findings of Fact and conclusions of Law. And may I give them to you so that you will - -

THE COURT: What paragraph?
MR. PERRY: 23. Paragraph 23.

THE COURT: I'm working with the joint pretrial order. Are those proposed findings? I don't have a paragraph 23 in mine.

MR. PERRY: Well, the joint pretrial is in - - that would be paragraph 20, Your Honor. I can show you the one filed.

THE COURT: Okay. I'm sorry. I see what the problem was. This was an earlier pretrial order that was filed.

MR. PERRY: Yes. Your Honor, in 1996.

THE COURT: Okay.

MR. PERRY: We had 1998 from Shell but Mobil wouldn't give us 1998.

THE COURT: Let me see that that you have.

MR. PERRY: May I approach the bench?

THE COURT: Yes.

Okay. The correct figures then or the judgment would be - - on Shell would be $202,910.61 for Mr. Ptasynski and $329,028.02 for Mr. Gray.

MR. ARONOWITZ: Your Honor –

THE COURT: And then on Mobil, figure would be $118,409.

Yes –

MR. PERRY; Yes, Your Honor.

MR. ARONOWITZ: Is Your Honor intending to award a judgment against Shell for the Santa Fe portion of the working interest that's burdened by Mr. Ptasynski's overriding royalty interest? About half that number is Santa Fe' s.

THE COURT: Yes.

MR. PERRY: Do you want this?

THE COURT: Yes. Do you have another copy?

MR. PERRY: I don't but I'll get one somehow.

THE COURT; We will file this and then give you a copy.

The exhibits that you provided for me during trial are up here on this stand, and I would like for the plaintiffs to take possession of the plaintiffs' exhibits and the defense to take possession of defense exhibits and hold those for appeal purposes.

MR. McCOLLAM: Well very well Your Honor.

THE COURT: Okay. And them if you will get me a judgment then I'll enter that promptly.

There was also a claim for attorney's fees based on the contract claim, and I - - unless you convince me otherwise, I don't think you're entitled to attorney's fees on the negligent misrepresentation claim.

MR. PERRY: How about prejudgment interest, Your Honor?

THE COURT: Prejudgment interest you're entitled to. Okay. And we will, stand adjourned.

MR. PERRY: Your Honor, may I have one other - Thank you very much, Your Honor.

THE COURT: Sure.

CA 3:97-CV-1208-R

IN THE UNTED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRY PTASYNSKI and W.L. GRAY & CO.,
Plaintiffs,

v.

SHELL WESTERN E&P, INC., SHELL OIL COMPANY, and
MOBIL OIL CORPORATION,
Defendants.

Filed August 13, 1999

FINAL JUDGMENT

For the reasons stated in the oral findings of fact and conclusions of law read into the record on August 9, 1999, it is ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs Harry Ptasynski and W.L. Gray & Co. In particular, judgment is entered in favor of Plaintiffs on their negligent misrepresentation claims alone. Judgment is entered in favor of Defendants on the remaining claims of breach of contract, negligence per se, fraud, and civil conspiracy.

Plaintiff Harry Ptasynski shall recover from Defendants Shell Western E&P Inc. and Shell Oil Company the sum of $246,000, which represents the amount of transportation charges deducted by Shell from January 1984 through June 1999, plus prejudgment interest. In addition, Plaintiff Ptasynski shall recover from Defendant Mobil Oil Corporation the sum of $142,000, which represents the amount of transportation charges deducted by Mobil from January 1984 through June 1999, plus prejudgment interest. And Plaintiff W. L. Gray & Co. shall recover from Defendants Shell Western E&P Inc. and Shell Oil Company the sum of

$352,000, which represents the amount of transportation charges deducted by Shell from January 1984 through June 1999, plus prejudgment interest. The prejudgment interest shall be calculated as simple interest at a rate of 10% per annum and shall run from May 21, 1997 through August 12, 1999. See Johnson & Higgins of TX v. Kenneco Energy, 962 S.W.2d 507, 528-533 (Tex. 1998); Harris v. Mickel, 15 F.3d 428,430 (5th Cir. 1994). Plaintiffs shall also recover postjudgment interest at the federal statutory rate of 4.966% per annum, and costs as allowed by law. Sec 28 U.S.C. 1961; FED. R. CIV. P. 54(d)(1).

Finally, declaratory judgment is entered in Plaintiffs' favor declaring that Defendants Shell Western E&P Inc., Shell Oil Company, and Mobil Oil Corporation shall calculate the value of the Plaintiffs' future overriding royalty payments based upon the contract price of carbon dioxide delivered to the Denver Unit in West Texas and shall not deduct or exclude any transportation charges to West Texas from these overriding royalty payments.

All relief requested by the parties and not granted in this Final Judgment is DENIED. In particular, Plaintiffs are not entitled to either exemplary damages nor attorneys fees. It is so
ORDERED.

Signed this 13 day of August, 1999.

CHIEF JUDGE JERRY BUSHMEYER
UNITED STATES DISTRICT COURT

CASE NO. 3:97-C V-1208-R

IN THE UNTED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRY PTASYNSKI, et. al.,
Plaintiffs,

v.

SHELL WESTERN E&P, INC., et. al.,
Defendants.

Filed September 1, 1999

ORDER

Now before this Court is Shell Defendants' Motion to Alter or Amend Judgment and to Amend Findings filed on August 27, 1999. They ask the Court to reconsider the Final Judgment entered on August 13, 1999 and amend the findings, which were entered into the record on August 9, 1999. The Motion asks for reconsideration of the Court's decision finding negligent misrepresentation, damages, and rejecting the Defendants' limitations defense and question the Court's jurisdiction to enter declaratory judgment relief in the Final Judgment.

The Court made detailed findings of fact and conclusions of law which were entered into the record on August 9, 1999 which resulted in the Final Judgment entered on August 13, 1999. Its findings regarding negligent misrepresentation, the damages suffered by the Plaintiffs as a result of the negligent misrepresentation and the findings regarding the timely filing of the Plaintiffs' lawsuit are supported by the testimony and evidence entered into the record at the trial of this case. The Court stands by its findings of fact and conclusions of law entered in this case and the exercise of the Court's authority to issue declaratory judgment relief regarding an actual

controversy between the parties and the declaration of the rights and legal relations of the parties in the lawsuit.

Consequently, Shell Defendants' motion is DENIED in its entirety. It is so ORDERED.

CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE